Supreme Court, U.S.
FILED
05-11 JUN 27 2005
OFFICE OF THE CLERK

No. ———

In the Supreme Court of the United States

GENCORP INC.,

Petitioner,

v.

OLIN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a unilateral administrative order a "civil action" that triggers a right of contribution under section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), a question this Court reserved in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004)?

2. Can a party who neither "owned [n]or possessed" hazardous substances be liable for arranging for disposal of those substances under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3)?

3. Can a party that did not actually arrange for disposal of hazardous substances be liable under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), despite this Court's unanimous holding in *United States v. Bestfoods*, 524 U.S. 51 (1998), requiring actual operation of disposal facilities for liability under section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner GenCorp Inc. and Respondent Olin Corporation. Pursuant to Supreme Court Rule 29.6, Petitioner GenCorp Inc. states that it has no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, GenCorp Inc. ("GenCorp"), respectfully petitions this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 3a-22a) is reported at 390 F.3d 433 (6th Cir. 2004). The opinions of the trial court are unreported. The liability decision of the trial court is reproduced at App. 33a-109a.

JURISDICTION

The Sixth Circuit's judgment was entered on November 22, 2004. (App. 3a.) The Sixth Circuit denied GenCorp's petition for rehearing and suggestion for rehearing en banc on March 29, 2005. (App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f)(1), provides in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of

> Civil Procedure, and shall be governed by Federal law. . . .

Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a), provides in relevant part that persons who are liable under CERCLA include the following:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

INTRODUCTION

This case involves an issue of national importance that this Court specifically reserved in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004): whether a unilateral administrative order ("UAO") issued by the United States Environmental Protection Agency ("EPA") under section 106 of CERCLA, 42 U.S.C. § 9606, is a "civil action" that permits a party subject to the UAO to bring a contribution action under CERCLA. In *Cooper Industries*, this Court held that a party cannot maintain a contribution action under section 113 of CERCLA, 42 U.S.C. § 9613(f), unless the party was previously sued in a "civil action" under section 106 or section 107(a) of CERCLA. This Court specifically reserved the question of whether a UAO is a "civil action," because the question was not presented by the facts of *Cooper Industries*. The present dispute squarely presents that question, because the vast majority of the more than $60 million of environmental response costs that

Respondent Olin seeks to recover from Petitioner were incurred under UAOs.

There are nearly 1,000 UAOs presently pending in forty-seven states, involving billions of dollars of cleanup expenses. *See* United States Environmental Protection Agency, Superfund Information Systems, CERCLIS Database, *available at* http://cfpub.epa.gov/supercpad/cursites/srchsies.cfm. (Last visited May 10, 2005). In this case, as in numerous others, a party subject to a UAO has sought contribution from other potentially responsible parties under section 113(f)(1) of CERCLA. But following this Court's reasoning in *Cooper Industries*, section 113(f)(1)'s plain, unambiguous statutory language does not allow a contribution action to be maintained based solely on a UAO. Accordingly, this Court should grant certiorari to resolve this important issue or, in the alternative, grant certiorari, vacate the Sixth Circuit's decision, and remand for further consideration consistent with *Cooper Industries*.

This case also raises important questions regarding the scope of liability under section 107(a)(3) of CERCLA. The Sixth Circuit decided to impose liability under CERCLA against Petitioner GenCorp, which did not own or possess and which did not actually arrange for the disposal of hazardous substances, as section 107(a)(3) plainly requires. Instead, the Sixth Circuit imposed liability based on a "control" test that does not appear anywhere in the statutory language. The Sixth Circuit's decision squarely conflicts with this Court's analysis of analogous statutory language in *Dole Food, Inc. v. Patrickson,* 538 U.S. 468 (2003). It also conflicts with the carefully crafted liability limitations this Court announced in *United States v. Bestfoods*, 524 U.S. 51 (1998), which made clear that CERCLA only imposes direct liability on a party

for the party's own actions, not for the alleged "control" of other parties.

The CERCLA liability issues raised in this dispute present recurring questions of national significance as the country's efforts to remediate environmental contamination continue, and the lawsuits those efforts invariably spawn persist. The importance of the questions presented counsels in favor of this Court's grant of the petition.

STATEMENT OF THE CASE

I. Overview.

In the 1960s, Petitioner GenCorp, then known as General Tire and Rubber Company, manufactured urethane foam for mattresses and other products. (App. 5a.) GenCorp's process for producing the foam required the chemical toluene di-isocyanate ("TDI"). (*Id.*) Respondent Olin had developed a proprietary process for the commercial production of TDI and was looking for customers. (App. 5a, 35a.)

Olin and GenCorp negotiated a supply contract in 1962 by which Olin would sell TDI to GenCorp. (App. 5a.) Under the contract, Olin built a plant to produce TDI on land owned by GenCorp. (*Id.*) Olin owned and operated the plant, manufactured the TDI, owned the hazardous waste created by the plant, and made arrangements with a local transporter to haul Olin's hazardous waste to a landfill known as "Big D." (App. 6a.) GenCorp was Olin's customer, agreeing to buy half of the TDI Olin manufactured at its TDI plant. (*Id.*) GenCorp also secured an option to purchase the plant from Olin (App. 45a), although the option was never exercised and Olin owned and operated the plant until Olin dismantled it. (App. 9a, 52a.)

Olin acknowledged environmental problems at Big D in 1970 (App. 9a.), and the EPA issued a UAO against Olin for the cleanup of the TDI plant site, known as the Fields Brook site, on March 22, 1989. (App. 58a, 68a.) A year later, the EPA issued a UAO against Olin for the cleanup of the Big D site. (App. 10a, 59a, 68a.) GenCorp was not named in the UAOs. Olin claims it incurred more than $65 million in remediation and response costs. (App. 9a, 62a.) Importantly, the EPA never initiated a judicial proceeding to impose the cleanup plan or require Olin to fund it.[1]

II. The Trial Court Imposes Liability Under Section 113(f)(1) On GenCorp

After "completely exclud[ing] GenCorp from more than a decade of negotiations with the US EPA," Olin belatedly targeted GenCorp by asserting that GenCorp was liable to Olin for contribution under section 113(f)(1) of CERCLA. (App. 98a.) After a bench trial, the trial court concluded that GenCorp was liable under section 113(f)(1) for having arranged for the disposal of Olin's hazardous waste (App. 12a, 91a-92a), even though the trial court did not find that GenCorp ever owned or possessed the hazardous waste disposed at issue. The trial court imposed on GenCorp 40% of the cleanup costs for the Fields Brook site and 30% of the cost for the cleanup associated with the Big D dump site. (App. 12a, 108a.)

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[1] Both the EPA and the Ohio Environmental Protection Agency did sue Olin under section 107(a) of CERCLA to recover oversight costs. Olin settled these suits and agreed to reimburse these government agencies for their administrative costs. These costs are distinct from the costs Olin incurred to remediate its pollution of the TDI plant and Big D sites.

III. The Sixth Circuit Affirms Even Though GenCorp Did Not Own Or Possess Olin's Hazardous Waste And Did Not Actually Arrange For Its Disposal.

The Sixth Circuit affirmed the trial court decision on November 22, 2004. (App. 4a.) The Sixth Circuit concluded that even though Olin, not GenCorp, actually arranged for disposal of the hazardous waste, and Olin, not GenCorp, owned and possessed the hazardous waste, GenCorp could be held liable as an arranger under CERCLA. (App. 4a, 20a, 21a-28a.)

The Sixth Circuit began by refusing to apply what the Sixth Circuit had previously referred to as the "*Bestfoods* requirement" that a defendant "be actively involved in the arrangements for disposal." *See Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846-47 (6th Cir. 1999). Instead, the Sixth Circuit limited this Court's reasoning in *Bestfoods* to the proposition "that CERCLA does not alter the common-law principle that, in the absence of a valid reason for piercing the corporate veil, a parent corporation is not liable for the acts of subsidiaries." (App. 23a.) The court concluded that GenCorp, as a large Olin customer, had a generalized intent to dispose of the hazardous waste at issue even though GenCorp was not actually involved in making arrangements for disposal of the waste.

The Sixth Circuit compounded its limitation of *Bestfoods* by concluding that GenCorp could be liable for arranging for the disposal of hazardous substances that it never "owned or possessed." Instead, the court affirmed liability based solely on alleged "control" of the hazardous substances owned and possessed by Olin. (App. 26a-28a.) In effect, the court concluded that control of hazardous waste was an adequate

substitute for the statutory requirement of ownership or possession.

IV. The Sixth Circuit Does Not Address The Effect Of *Cooper Industries, Inc. v. Aviall Services, Inc.*

On December 6, 2004, GenCorp filed a timely petition for rehearing and suggestion for rehearing en banc. In its petition, GenCorp advised the Sixth Circuit of this Court's pending decision in *Cooper Industries, Inc. v. Aviall Services, Inc.* While GenCorp's petition was pending, the Court issued its decision in *Cooper Industries*, holding that CERCLA's plain language requires that a party be subject to a civil action under section 106 or 107(a) of CERCLA before that party can seek contribution from other potentially responsible parties under section 113(f)(1). *Cooper Indus., Inc. v. Aviall Servs. Inc.*, 125 S. Ct. 577 (2004). GenCorp sought and received leave to file a reply brief to address the effect of the *Cooper Industries* decision on this case.

In its reply brief, GenCorp explained that Olin's claims should be barred after *Cooper Industries* because Olin was not subject to a civil action under section 106 or 107(a) of CERCLA. Instead, Olin incurred remediation and response costs complying with UAOs issued by the EPA. Because the issue of whether a UAO is a "civil action" under section 113(f)(1) was specifically reserved by this Court in *Cooper Industries*, 125 S. Ct. at 584 n.5, GenCorp urged the Sixth Circuit to grant its petition and vacate judgment in favor of Olin so that either the Sixth Circuit or the district court could consider whether a unilateral administrative order was a civil action. The Sixth Circuit denied GenCorp's petition for rehearing without comment and without addressing the effect of this Court's decision in *Cooper Industries*. (App. 1a.)

REASONS FOR GRANTING THE PETITION

This case presents a question of national legal importance that this Court specifically reserved in *Cooper Industries*: whether an administrative order is a "civil action" that permits a party to maintain a contribution claim under section 113(f)(1) of CERCLA. The Sixth Circuit did not address that issue, leaving in flux the status of CERCLA contribution actions involving the nearly 1,000 UAOs that are currently pending across the country. This Court should grant the petition and either address the merits of GenCorp's appeal, or summarily vacate and remand for reconsideration in light of *Cooper Industries*.

This case also presents questions of national import regarding the scope of arranger liability under CERCLA. The Sixth Circuit's decision broadens the scope of liability under CERCLA beyond the plain language of the statute itself to impose liability on a party that did not "own" or "possess" hazardous substances and did not actually arrange for the disposal of that waste. The decision below thus conflicts with this Court's decisions in *United States v. Bestfoods*, 524 U.S. 512 (1998), and *Dole Food, Inc. v. Patrickson*, 538 U.S. 468 (2003). Indeed, the decision below effectively imposes arranger liability on customers simply for purchasing products with knowledge that the production process will create hazardous substances that must be disposed, an unprecedented expansion of CERCLA liability that rewrites CERCLA's liability requirements.

This Court may, of course, allow the issues in this case to "percolate" in the lower courts until a conflict among the courts of appeals develops. But in view of the inevitably recurring nature of the issues, the prospects are high that a circuit split will emerge. The ensuing percolation is likely to

impose a substantial cost on an already overtaxed federal judiciary. Not only are there a substantial number of potential plaintiffs who may have an incentive to bring suits like Olin's, but those suits are inherently complex, involving expert testimony and scientific inquiry about site conditions. In short, if GenCorp is correct that CERCLA does not authorize contribution following a UAO or based solely on alleged "control," then allowing such litigation to go forward will result in a wasteful expenditure of time and resources for all concerned. These questions are sufficiently important to warrant resolution now, just as this Court resolved the companion question in *Cooper Industries*.

I. This Court Should Grant The Petition To Address The Issue Reserved In *Cooper Industries*.

This Court has often granted certiorari to consider issues that it specifically reserved in earlier decisions. *E.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379-80 & n.6 (1983) (noting that certiorari had been granted to consider an issue the Court had previously reserved in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 n.15 (1975)); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981) (explaining that certiorari was granted to decide an "important question of federal labor law" reserved in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 n.7 (1962)). Indeed, this Court has even granted certiorari to consider issues reserved during the preceding term. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 656 (1974) (deciding a question that was specifically reserved in *Bradley v. United States*, 410 U.S. 605 (1973)). The present dispute presents a question this Court reserved in *Cooper Industries*, and that issue should be decided now.

In *Cooper Industries,* this Court granted certiorari to address whether a party may maintain an action for contribution under section 113(f)(1) of CERCLA in the absence of a prior civil action under CERCLA sections 106 or 107(a). Respondent Aviall brought suit under section 113(f)(1), seeking contribution for expenses Aviall incurred responding to a state agency's cleanup demands. 125 S. Ct. at 582. This Court explained that Aviall could not maintain an action under section 113(f)(1), because Aviall's suit was not brought "during or following any civil action under section 9606 . . . or under section 9607(a) . . . ." *Id.* at 583; 42 U.S.C. § 9613(f)(1). Aviall was not subject to an administrative order under section 106, however, so this Court reserved the issue of "whether such an order would qualify as a 'civil action under section 9606 . . . or under section 9607(a)' of CERCLA." *Cooper Indus.*, 125 S. Ct. at 584 n.5 (quoting 42 U.S.C. § 9613(f)(1)). The importance of the issue this Court appropriately reserved in *Cooper Industries* is underscored by the fact that within months of the decision, a district court had already dismissed claims under section 113(f)(1) where the plaintiff incurred cleanup expenses in response to a section 106 UAO. *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, No. 02-CV-0428, 2005 WL 615755, at *11 (S.D. Ill. Mar. 8, 2005).

Here, Respondent Olin similarly incurred almost all of the costs at issue under two of the EPA's nearly 1,000 pending UAOs. Olin did not incur any remediation or response costs for the Big D and TDI plant sites related to any past or pending civil action under section 106 or section 107(a) of CERCLA.[2] Accordingly, Olin cannot maintain its claims

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[2] Olin's contribution action seeks contribution for remediation and response costs related to three contaminated sites: Big D, Fields

against GenCorp under section 113(f)(1) unless the two UAOs are "civil actions."

This Court granted certiorari to Cooper Industries on January 9, 2004, after the substantive briefing in the present case was already complete. The Sixth Circuit's decision below was entered on November 22, 2004, a few weeks before this Court issued its decision in *Cooper Industries*. Accordingly, GenCorp advised the Sixth Circuit of the potential impact of the Court's pending *Cooper Industries* decision in its petition for rehearing and suggestion for rehearing en banc. After the *Cooper Industries* decision was issued, GenCorp obtained leave from the Sixth Circuit to file a reply brief that addressed the effect of *Cooper Industries* on this case.[3] GenCorp noted that this Court specifically reserved the issue of whether a UAO can be considered a civil action to justify a contribution claim under section 113(f)(1).

The Sixth Circuit denied GenCorp's petition for rehearing without acknowledging *Cooper Industries*. (App. 1a-2a.) This case is therefore ripe for an order granting certiorari, vacating the Sixth Circuit's decision, and remanding the case for further consideration ("GVR"). The Court explained its practice of issuing GVR orders in *Lawrence v. Chater*:

Brook, and the Reserve Environmental Site ("RES"). The vast majority of the more than $60 million for which Olin seeks contribution was not subject to any judicial proceeding under section 106 or section 107(a), and was incurred by Olin under the EPA's UAOs for the cleanup of the Big D and Fields Brook sites.

[3] GenCorp also raised the question in the district court between the time of the Fifth Circuit's panel and *en banc* decisions, and before this Court granted certiorari in *Cooper Industries*.

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167 (1996). The most common reason for issuing a GVR order is "a postjudgment decision of this Court . . . [that] has cast doubt upon the judgment rendered by a lower . . . court." *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J. dissenting from the grant of certiorari in *Stutson* as well as *Lawrence*) (citing cases); *see Lawrence*, 516 U.S. at 166. GVR orders are especially appropriate where, as here, the Court of Appeals writes no opinion showing whether and how it considered precedent of this Court that the district court did not have any opportunity to consider. *See id.* at 169.

This Court's decision in *Cooper Industries* is an intervening development that neither the Sixth Circuit nor the district court had opportunity to consider. It occurred after the Sixth Circuit issued its decision on GenCorp's appeal. Moreover, the Sixth Circuit's decision denying rehearing fails to show whether and how that court considered the *Cooper Industries* decision. Instead, the Sixth Circuit's order peremptorily denied GenCorp's petition for rehearing without substantive comment.

Moreover, *Cooper Industries* should have outcome-determinative effect on Olin's contribution claim. As the United States District Court for the Southern District of

Illinois explained in *Pharmacia*, the phrase "civil action" in section 113(f)(1) must mean "a non-criminal judicial proceeding." *Pharmacia*, *supra* at *7. *See also Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004) (quoting *Black's Law Dictionary*, 29 (7th ed. 1999)) ("Black's Law Dictionary defines [the term 'action'] as 'any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.'"). And interpreting the term "civil action" in section 113(f)(1) to refer solely to judicial proceedings is consistent with the interpretation given that term in other contexts. For example, Federal Rule of Civil Procedure 3 states "a civil action is commenced by filing a complaint with the court." Likewise, the term "civil action" as used in 28 U.S.C. § 2401(a) "'is a term of art judicially and statutorily defined as one "commenced by filing a complaint with [a] court," not an executive board'." *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (quoting *N.V. Philips' Gloeilampenfabrieken v. AEC*, 316 F.2d 401, 406 (D.C. Cir. 1963)) (alteration in original). *See also In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998) (removal under 28 U.S.C. § 1441 applies only to a "civil action" and accordingly requires the filing of a complaint in court); *Barrows v. Am. Airlines, Inc.*, 164 F. Supp. 2d 179, 182 (D. Mass. 2001) (same).

Likewise, interpreting "civil action" to exclude UAOs is consistent with section 113(g)(3), which establishes a three-year statute of limitations for contribution actions under section 113(f)(1) that starts to run at "judgment." 42 U.S.C. § 9613(g)(3). As the *Pharmacia* court explained, "no judgment exists as to an administrative order." *Pharmacia*, *supra* at *7. If, a UAO is not a "civil action" as required by section 113(f)(1), then Olin cannot maintain a contribution claim against GenCorp under section 113(f)(1).

Because the Sixth Circuit and the district court did not have the opportunity to assess the effect of *Cooper Industries* on this case, and because the Sixth Circuit gave no indication whether and how it addressed the decision in its order denying rehearing, this case is ideal for a GVR order. Alternatively, the national importance of the issue this Court reserved in *Cooper Industries* counsels in favor of granting GenCorp's petition for certiorari and resolving the issue on the merits.

II. The Sixth Circuit's Decision Conflicts With Relevant Decisions Of This Court.

A. The imposition of arranger liability under CERCLA conflicts with this Court's analysis in *Dole Food Co. v. Patrickson*.

Section 107(a)(3) of CERCLA imposes liability on persons "who . . . arranged for disposal . . . of hazardous substances *owned or possessed by such person*." 42 U.S.C. § 9607(a)(3) (emphasis added). The Sixth Circuit affirmed the trial court's decision to impose liability on GenCorp even though GenCorp did not own or possess the hazardous waste because GenCorp had some measure of "control over the hazardous waste." (App. 27a.) The lower courts' decisions are contrary to this Court's analysis of similar statutory language in *Dole Food Co. v. Patrickson*, 538 U.S. at 476-77.

In *Dole Food*, this Court addressed whether Israel's "considerable control" over two corporations made those corporations instrumentalities of Israel under the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 477. The FSIA defines "instrumentality" to be "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Israel did not own

the corporations, but two defendants claimed that Israel's "considerable control" over the companies' operations should fulfill the statute's ownership requirement. *Dole Food*, 538 U.S. at 477.

The Court explained that control and ownership are "distinct concepts," and held that "the terms of [the FSIA] are explicit and straightforward . . . *ownership* . . . *not control, is the benchmark* of instrumentality status." *Id.* at 477 (emphasis added).

Section 107(a)(3) plainly and unambiguously requires ownership or possession of the hazardous waste to impose liability on a defendant. 42 U.S.C. § 9607(a)(3). Courts that have imposed arranger liability based on control, rather than the statutorily required possession or ownership, have done so based on the theory that "requiring proof of personal ownership or actual physical possession of hazardous substances . . . would be inconsistent with the broad remedial purposes of CERCLA." (App. 26a); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986). *See also United States v. Shell Oil Co.*, 294 F.3d 1045, 1056, 1058 (9th Cir. 2002). But such policy considerations cannot trump the plain language of a statute. *Brogan v. United States*, 522 U.S. 398, 408 (1998). *See also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute is its language."). Accordingly, the Sixth Circuit's decision to import a control-based standard into a statute that requires ownership or possession conflicts with this Court's analysis in *Dole Food*.

B. The Sixth Circuit's decision nullifies the CERCLA liability limits this Court established in *United States v. Bestfoods*.

The analysis for imposing arranger liability under section 107(a)(3) is analogous to that for imposing "operator liability" under section 107(a)(2). In *United States v. Bestfoods*, 524 U.S. 51 (1998), this Court applied the plain language of the statute to limit direct operator liability. The courts of appeals have subsequently applied the reasoning in *Bestfoods* to limit arranger liability under section 107(a)(3) to parties who are "actively involved in the arrangements for disposal." *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846-47 (6th Cir. 1999); *see also Raytheon Constructors, Inc. v. Asarco*, 368 F.3d 1214, 1220 (10th Cir. 2003). The decision below effectively nullifies the limits on CERCLA liability recognized in *Bestfoods*, because it imposes liability on a party that had only a generalized intent to purchase a product from a supplier that would necessarily generate a hazardous waste stream while making the product, not because of any actual involvement in arranging for disposal of the waste.

In *Bestfoods*, the Court rejected the trial court's "participation and control" standard for imposing direct liability. *See Bestfoods*, 524 U.S. at 67-69. Rather, the *Bestfoods* Court held that direct liability under CERCLA may attach only if the parent company actually operates the polluting facility, not merely because the parent has the ability to control, or even actually controls, the subsidiary. *Id.* at 64.

When applied to claims of arranger liability under section 107(a)(3), the Court's *Bestfoods* analysis indicates that knowledge of disposal by others, and even control or influence over disposal decisions by others, does not satisfy

the statutory requirement for arranger liability. Instead, *Bestfoods* requires that a party be actively involved in arranging for disposal.

The Sixth Circuit's decision below to impose liability based solely on GenCorp's generalized intent that waste would be disposed of thus conflicts with *Bestfoods*. The decision would permit a parent corporation that is shielded from CERCLA liability by *Bestfoods* to be liable as an arranger, permitting an end run around the *Bestfoods* liability limits. Indeed, if the panel's analysis is correct, then the parent company in *Bestfoods* would have to be liable as an arranger based on its knowledge of and involvement in its subsidiary's waste disposal. In every case where *Bestfoods* precludes CERCLA liability, liability could nevertheless be imposed under the panel's analysis. Without the limits of *Bestfoods*, virtually every customer that purchases significant quantities of products from a manufacturer that has to generate and dispose of hazardous waste will face potential liability for cleanup costs the supplier later incurs. This Court should grant certiorari and address these important issues of federal environmental law.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the Court should grant the writ of certiorari, vacate the Sixth Circuit's decision, and remand the case to the Sixth Circuit to address the effect of the Court's decision in *Cooper Industries*.

June 27, 2005

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-3019/3211

[Filed March 29, 2005]

GENCORP, INC.,	)
Plaintiff-Appellant/Cross-Appellee,	)
	)
v.	)
	)
OLIN CORPORATION,	)
Defendant-Appellee/Cross-Appellant.	)
	)

BEFORE: MARTIN and SUTTON, Circuit Judges; and WILLIAMS,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

** Judge Moore recused herself from participation in this ruling.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-3019/3211

[Filed November 22, 2004]

GENCORP, INC.,
Plaintiff-Appellant/Cross-Appellee,

v.

OLIN CORPORATION,
Defendant-Appellee/Cross-Appellant.

BEFORE: MARTIN and SUTTON, Circuit Judges; and WILLIAMS,* District Judge.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 93-02269
David S. Perelman, Magistrate Judge

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

SUTTON, Circuit Judge. In the 1960s, GenCorp, Inc. and Olin Corporation began a business relationship that defies easy categorization. By agreement of the parties, Olin built a manufacturing plant with GenCorp's assistance that for more than a decade supplied GenCorp with a chemical used to produce urethane foam. The manufacturing plant also produced hazardous waste. Plant operators hauled the waste to an offsite landfill, which eventually landed on the EPA's National Priority List of hazardous waste facilities and which generated clean-up costs of more than $ 65 million.

Olin sued GenCorp under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, to recover a percentage of the clean-up costs and to obtain a declaratory judgment that GenCorp bore responsibility for that same percentage of future costs. The district court granted the relief, concluding that GenCorp was a "[c]overed person[]" under § 9607(a) of the statute because it "arranged for disposal . . . of hazardous substances" and concluding that it was responsible for 70% of the clean-up costs at the landfill. We agree with that conclusion and reject each of the parties' other challenges to the district court's decision except one: Olin's claim that a declaratory judgment should have been entered. Accordingly, we affirm the district court's judgment as to GenCorp's contribution liability and the apportionment of liability between the parties but remand the case to consider Olin's request for a declaratory judgment.

I.

A.

During the 1960s, GenCorp (once known as "General Tire and Rubber Company") manufactured urethane foam—a material used in carpets and mattresses, among other products—at a plant (the "PVC Plant") located in Ashtabula, Ohio. Among other ingredients, the production of the foam required toluene di-isocyanate ("TDI"), which is a "critical" chemical ingredient in the process. JA 1319. To minimize the financial risks of urethane production, GenCorp sought a reliable and cost-effective source of TDI.

Olin Corporation claimed to have a supply answer to this demand. Having developed a cost-effective process for producing TDI, which involved highly toxic chemicals, including phosgene or "mustard" gas, it began discussions with GenCorp about building and operating a plant for manufacturing the chemical (the "TDI Plant"). On June 21, 1962, after lengthy negotiations, the parties concluded a final agreement (the "1962 Agreement").

As the contractual cornerstone of the 1962 Agreement, Olin agreed to "erect or cause to be erected, at its sole cost and expense" the TDI Plant. JA 660. The parties agreed to locate the plant on land owned by GenCorp, which was adjacent to GenCorp's own PVC Plant (where the TDI from Olin's new plant would eventually be converted into urethane foam), and agreed that Olin would pay GenCorp $10 a year for the lease of the land. Olin also agreed to build a second plant at its own expense to produce toluene di-amine or "TDA"—a chemical needed in the TDI manufacturing process—and to supply enough TDA to meet the TDI Plant's requirements.

In return, GenCorp agreed to purchase 50% of the TDI Plant's output at cost, which included variable costs, fixed costs for the TDI Plant and "related facilities," and a "charge-in" for the TDA supplied by Olin to the plant. JA 671. Both parties remained free to sell TDI to third parties without sharing any profits from these sales. GenCorp also agreed to purchase hydrochloric acid—an additional byproduct of the TDI manufacturing process—from Olin and to supply steam from its PVC Plant to meet the TDI Plant requirements.

Olin initially retained title to the TDI Plant under the 1962 Agreement and "owned and operated" the plant. JA 660, 663. The parties agreed that at some later date Olin would "sell, convey and transfer" title to the TDI Plant to GenCorp at Olin's then-current book value for the plant. JA 678-79. GenCorp agreed to advance Olin up to one half of its total capital costs for the plant as "earnest money [] towards its obligation to purchase and acquire the TDI Plant." JA 680. That amount, it was agreed, would be "credited by Olin against the ultimate sale and purchase price" due at the future sale. *Id.* The parties affirmed in a separate agreement that GenCorp had a "definite obligation to take title" to the TDI Plant and had committed itself to this purchase through a "substantial deposit against the ultimate purchase price." JA 699. In accordance with these future plans for ownership of the plant, the engineering specifications for the plant were "subject to the approval" of both GenCorp and Olin, JA 662, and Olin agreed not to make any capital expenditures without GenCorp's approval after the plant's start-up. Olin also agreed to insure the TDI Plant for "all risk of loss, liability and damage to property and facilities." JA 679.

To the ends of "oversee[ing] the construction, operation and management of the TDI plant," the contract created a four-member committee (the "TDI Committee") composed of

two representatives of GenCorp and two representatives of Olin. In consultation with the committee, Olin agreed to select a Plant Manager and other staff "to supervise the day-to-day operation of the plant." JA 663. Olin also agreed to appoint a Committee Manager, who was the sole party authorized to instruct the Plant Manager on behalf of the Committee. The 1962 Agreement contained no guidelines for committee governance--*i.e.*, specifying whether decisionmaking would occur by consensus or by majority vote, or how a deadlock would be resolved—but rather allowed the Committee to devise its own management rules (which apparently were never created).

Although not detailed in the agreement, GenCorp supplied all of the TDI Plant's hourly workers, keeping them on its own payroll and negotiating a collective bargaining agreement for them. Olin, on the other hand, supplied and paid many of the plant's salaried, supervisory employees, including the Plant Manager and other departmental heads, although GenCorp filled some management positions with its own employees. All employees ultimately reported to the Olin-appointed Plant Manager.

The 1962 Agreement did not address hazardous waste disposal. The TDI manufacturing process generated at least two byproducts that amount to "hazardous waste" for CERCLA purposes: a tar-like residue waste and spent vacuum-pump oils, both of which contain the toxic chemicals TDI, TDA and chlorobenzene. Early plant designs contemplated generation and disposal of the TDI residue. The TDI Plant engineer told Phillip Sayre, a GenCorp employee who reviewed the design specifications, that the TDI chemical residue would be "drum[med] [] off and bur[ied]." JA 1323. Despite Sayre's concerns about the dangers of this plan, which he conveyed to his supervisors at GenCorp, GenCorp

approved the plant designs and capital appropriation requests by Olin. *Id.*

After approving the plant designs, the TDI Committee discussed TDI residue disposal and the GenCorp committee members researched and recommended offsite locations for disposal sites in view of their greater familiarity with the Ashtabula area. D. Ct. Op. of July 14, 1999, at 40 [hereinafter D. Ct. Op.]. TDI employees disposed of some waste at the plant site itself, which the parties agree caused a "release" into the waterway known as "Fields Brook" that ran between the TDI and PVC Plants on GenCorp's land (a site that is the subject of this litigation but not this appeal). *Id.* Benjamin Brenkus, a hauler apparently hired by the Olin Plant Manager, carried other waste offsite. From the beginning of plant operations in 1964 through February 1976, Brenkus hauled waste to the Big D site, all of which the TDI Plant hourly employees had placed in metal drums and loaded onto Brenkus' truck for disposal. D. Ct. Op. at 41. Payment for Brenkus' hauling efforts required completion of a service requisition form, which on occasion GenCorp employees in intermediate management positions signed. *Id.*

Over the years of the TDI Plant's operation, the Committee addressed the issue of waste disposal in a variety of ways. TDI residue disposal (*i.e.*, the hauling costs) appeared as a line item on Olin's budget for the TDI Plant, which the Committee approved, and which GenCorp paid for as part of the variable costs incorporated into the TDI price. The Committee approved (apparently without dissension) capital expenditures aimed at reducing the volume of waste generated by the plant. D. Ct. Op. at 41. GenCorp Committee member Robert Laundrie visited the Big D site more than once, and he issued his criticisms of disposal methods to Olin's Plant Manager, *id.* at 40-41 (although the record

contains no evidence as to whether Olin acted upon these concerns). And GenCorp and Olin jointly funded "Golden TDI" research, a program aimed (fruitlessly, it turns out) at finding commercial uses for the TDI residue in order to reduce the amount of waste shipped offsite. *Id.* at 41.

Despite the title-transfer provision of the 1962 Agreement, GenCorp never purchased the TDI Plant from Olin. Instead, on September 27, 1971, the parties signed a new agreement (the "1971 Agreement") that terminated the 1962 Agreement effective October 1, 1973. In the new agreement GenCorp relinquished its right to purchase the TDI Plant in exchange for a $ 1.65 million payment from Olin as reimbursement for its earlier "earnest money." JA 929. GenCorp also extended its lease of the land on which the plant was located for three additional twenty-year terms. In a separate agreement signed on the same day, the parties agreed that GenCorp would purchase "not less than 80%" of its yearly TDI requirements at a price determined under a new formula supplied by the agreement (essentially the lesser of market price or cost). JA 931. At the same time they signed these new agreements, the parties unwound earlier employment arrangements by transferring the GenCorp employees working at the TDI Plant to Olin's payroll and by dissolving the TDI Committee. D. Ct. Op. at 15.

B.

In the late 1970s, Olin began investigating toxic contamination at the Big D site, identifying the property as an "area of concern requiring further study." D. Ct. Op. at 16. In May of 1980, the Ohio EPA requested information from Olin about disposal of waste from the plant. And in June of 1981, the matter came before the federal EPA, after Olin filed a notification required by CERCLA that it had disposed of

28,000 tons of waste at the Big D site. The TDI Plant ceased operations later that year, and Olin began dismantling the facilities as well as performing clean up and decontamination of the plant site.

At its own initiative, but in consultation with state environmental officials, Olin performed an erosion-control project at the Big D site in 1982. The project increased the slope gradient of the landfill through the addition of topsoil and clay in order to redirect storm water run-off, at a cost of over $780,000, D. Ct. Op. at 18—none of which Olin seeks to recover from GenCorp. Olin informed the state and federal environmental agencies about its efforts, claiming that "the [Big D site] is not a significant threat to human health or the environment and no further corrective action is required or warranted." JA 1110.

The federal EPA disagreed with this assessment. On September 8, 1983, after a notice-and-comment period, it placed both the Big D and Fields Brook sites on the National Priority List for clean-up. In 1985, the federal agency notified Olin that it was a "potential responsible party" for the site and requested that Olin provide information concerning the site and conduct a "remedial investigation and feasibility study" for the landfill. *Id.;* D. Ct. Op. at 19. Negotiations for a remedial action plan for Big D took place during 1989 and 1990. When Olin refused to yield on certain points in the negotiations, the federal EPA issued a unilateral administrative order on March 27, 1990, under CERCLA § 106, 42 U.S.C. § 9606, requiring Olin to implement the agency's remedial action plan for the site. D. Ct. Op. at 20-21. Olin formed a "Big D Site team" and in late 1992 began implementing the remedial action plan. *Id.* at 21-23.

C.

Anticipating that Olin would seek contribution for these remediation costs, GenCorp filed a declaratory judgment action against Olin on October 25, 1993, in the United States District Court for the Northern District of Ohio. GenCorp sought a declaration that it was not liable under CERCLA for the clean-up costs at Big D and Fields Brook, among other sites. Olin counterclaimed, seeking its own declaration either that GenCorp was jointly and severally liable with Olin for the response costs or owed Olin contribution for at least one half of the costs. The parties voluntarily dismissed GenCorp's claim in 1995, but continued litigating Olin's counterclaim. GenCorp eventually amended its response to Olin's counterclaim, claiming "breach of contract to insure" the TDI plant, among other claims. JA 161.

By consent of the parties, the district court transferred the case to Magistrate Judge David Perelman for trial. The court initially denied both parties' motions for summary judgment, determining that genuine issues of fact precluded any pre-trial disposition of the claims. Before trial, however, the district court reconsidered its decision in light of intervening case law and entered summary judgment against Olin on one of its counterclaims. It determined that Olin could not maintain its claim for joint and several liability under CERCLA § 107 because it was a potentially liable party itself and thus could seek only contribution from GenCorp. *See* D. Ct. Mem. & Order of Feb. 23, 1999, at JA 387; *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998).

With respect to Olin's remaining contribution claim under § 113(f), the district court conducted trial proceedings in three phases. Phase I dealt with the initial question of liability;

Phase II allocated liability between the parties on a percentage basis; and Phase III assigned a dollar amount to these percentages. After a bench trial addressing the Phase I and II issues, the district court determined that GenCorp was liable as an "arranger" of hazardous waste disposal under CERCLA either by virtue of its affiliation with Olin in an "association" or "commercial entity" (but not a joint venture)--such that the two companies constituted a single "person" under 42 U.S.C. § 9601—or by virtue of its activities carried out in its own name. D. Ct. Op. at 47. The court also determined that GenCorp was liable as an "owner" and an "operator" of the land on which the plant was built. *Id.* at 42-43. In addressing the parties' respective shares of liability, the district court concluded that GenCorp should bear 30% of the costs of Big D (and Olin 70%) and GenCorp should bear 40% of the costs of the Fields Brook site (and Olin 60%). D. Ct. Op. at 60. During Phase III, the district court determined that these liability shares translated into costs to GenCorp of approximately $19 million (plus more than $9 million in prejudgment interest) and entered a judgment in that amount. D. Ct. Op. of May 10, 2002 at 77-78; Judgment Order at JA 597.

The district court did not finally resolve GenCorp's breach-of-contract claims based on Olin's alleged promise to insure. It tabled the ultimate resolution of the claim in light of a pending dispute in the Southern District of New York between Olin and its insurers over the insurers' responsibility to pay for the hazardous waste clean-up costs. The court determined that Olin had satisfied its contractual obligation to GenCorp, and if Olin obtained any recovery from its insurers in the New York proceeding, that recovery would "inure to the benefit of . . . [GenCorp]" as well. D. Ct. Op. of May 10, 2002, at 77. Because that parallel proceeding had not concluded, the district court "held in abeyance a

determination as to what share of any recovery [in the New York litigation] would be GenCorp's," but entered a final judgment in the remainder of the suit under Federal Rule of Civil Procedure 54(b). *Id.*

The appeal and cross-appeal from the district court's judgment raise a host of questions: (1) does this Court have jurisdiction over the suit? (2) does the statute of limitations bar Olin's claim? (3) is GenCorp liable for response costs related to the Big D site as an "arranger" for the disposal of hazardous waste generated by the TDI Plant? (4) did the district court abuse its discretion in determining each parties' proportionate responsibility for the clean-up costs? (5) did the district court err in awarding prejudgment interest? and (6) should the district court have granted Olin's request for declaratory relief regarding future clean-up costs?

II.

As a matter of first priority, the Court has jurisdiction over this appeal. Under Rule 54(b) of the Federal Rules of Civil Procedure, a district court may, "[w]hen more than one claim for relief is presented in an action, . . . direct the entry of a final judgment as to one or more but fewer than all of the claims," provided that the court makes "an express determination that there is no just reason for delay and upon express direction for the entry of judgment." Compliance with the rule permits immediate appellate review of a district court's judgment even though the lawsuit contains unresolved claims. *See Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994).

To comply with the rule, a district court initially must expressly "direct the entry of final judgment as to one or more but fewer than all of the claims" in the case. *Id.* It then

must determine whether "the needs of the parties" outweigh the efficiency of having one appeal at the conclusion of the case in its entirety, and it must spell out its reasons for concluding that prompt review is preferable. *Id.* at 1027. On appeal, we review compliance with the first requirement de novo, *id.* at 1027, and compliance with the second requirement for an abuse of discretion, *id.; see also Curtiss-Wright Corp. v. Gen. Elec. Corp.*, 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

As to the first requirement, this case involves more than one claim and the district court permissibly entered final judgment as to all but one of the claims—GenCorp's contract claim that Olin failed to obtain insurance for the TDI Plant. A "claim" under Rule 54(b) "denotes the aggregate of operative facts which give rise to a right enforceable in the courts" even if the party has raised different theories of relief. *Gen. Acquisition,* 23 F.3d at 1028 (quotation marks omitted). In this case, the district court had before it Olin's contribution claim as well as GenCorp's breach-of-contract and other claims. Olin's contribution claim arises under CERCLA while GenCorp's contract claim arises under state law governing contractual rights and fiduciary responsibilities. The claims also do not share a single "aggregate of operative facts." Olin's CERCLA claim arises from the disposal of hazardous waste at the Big D landfill, while GenCorp's claim arises out of Olin's alleged duty to insure for risks related to the TDI Plant. Nor does the fact that Olin's recovery on its claim could be set off in full or in part by GenCorp's recovery on its claim impede the separability of these claims for appeal purposes. *See Curtiss-Wright,* 446 U.S. 1, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (reversing court-of-appeals determination that certification of claim was improper because pending counterclaim could ultimately provide set-off to liability). Lastly, the district court's resolution of the CERCLA claim

satisfies the finality requirement of Rule 54(b) and 28 U.S.C. § 1291, as the court provided an "ultimate disposition" of the claim and addressed all forms of relief requested by Olin. *Compare Liberty Mut. Ins. Co. v. Wetzel,* 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976) (concluding that district court's finding of liability, which did not address any of the relief requested by the plaintiff, did not satisfy Rule 54(b)); *Gen. Acquisition,* 23 F.3d at 1027 (determining that district court's judgment resolving damages issue but not liability was not "final").

As to the second requirement, the district court did not abuse its discretion in concluding that it would be efficient presently to dispose of all of the claims, save for GenCorp's insurance-contract claim. In arguing to the contrary, GenCorp contends that the district court "failed to make the required findings or to balance the . . . factors that should be considered." GenCorp's Mot. to Dismiss at 2. In fact, however, the district court did explain why there was no "just reason for delay." D. Ct. Op. of Nov. 21, 2002, at 10. And its explanations for certifying the partial judgment for appeal in this decade-long suit made ample sense given that the only question remaining on GenCorp's claim was one that would be resolved by another court and given the likelihood that GenCorp would appeal its CERCLA liability (in view of its possible preclusive effect) even if the amount owed was wholly offset by an insurance recovery.

III.

GenCorp next argues that Olin failed to comply with the applicable statute of limitations in bringing its CERCLA contribution claim. We disagree.

As an initial point of reference, the parties share common ground that § 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), applies to this action. They agree with the district court that § 113(g)(2)—not § 113(g)(3) (entitled "Contribution")—applies to this case because Olin incurred clean-up costs at Big D not as the result of a court judgment or settlement with the government but as the result of a unilateral administrative order issued by the EPA under § 9606. For this reason, the district court concluded, Olin's counterclaim constituted "an initial action for recovery of [] costs" under § 113(g)(2). *See* D. Ct. Op. at 25-27; *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997) (deciding that where a party bringing a contribution suit incurs clean-up costs by means other than a judgment or settlement, *e.g.*, a unilateral administrative order, that suit *is* the "initial action" for recovery of costs under § 113(g)(2)); *see also Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924-25 (5th Cir. 2000) (adopting rationale of *Sun*); *Centerior*, 153 F.3d at 355 (agreeing in *dicta* with *Sun*).

Having agreed that § 113(g)(2) governs this case, the parties dispute which portion of § 113(g)(2) applies. Section 113(g)(2) contains two different time limitations, and provides:

> An initial action for recovery of [] costs . . . must be commenced-- (A) for a removal action, within 3 years after completion of the removal action . . .; and (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action.

42 U.S.C. § 9613(g)(2). In GenCorp's view, the actions taken by Olin in the early 1980s at the Big D site—changing the slope of the land and adding topsoil at a cost of $780,000—triggered the "initiation" of "remedial action" for the statute of limitations, which means that the time for bringing a remedial-recovery lawsuit has long since passed. In Olin's view, the limitations period did not begin running in the 1980s (1) because these earlier efforts constituted "removal" but not "remedial" actions and (2) because the work done in the early 1980s was "separate and distinct from, and could not start the limitations period for, the work done in the 1990s in response to the EPA's orders" even if the earlier work was "remedial" in nature. Olin Br. at 53. (Olin also argues that GenCorp waived its statute-of-limitations defense, but we need not reach that question.)

In resolving this issue, the district court looked to the National Contingency Plan regulations defining removal actions, and determined that Olin's "work performed in the early 1980s falls within the parameters of removal actions." D. Ct. Op. at 28. The district court noted that the short duration of the project and its relatively low cost indicated that the action constituted removal, not remediation. *Id.* The work done in the 1980s, the court added, did not meet the test for remedial actions because it took place before the "remedial investigation and feasibility study" and before the EPA's unilateral administrative order implementing the final plan for the site. *Id.* at 29.

We agree with this analysis—with one elaboration. The salient point here is that CERCLA's definition of "remedial action" imposes a separate requirement on the term: "remedial action" encompasses only "those actions *consistent with [the] permanent remedy taken* . . . to prevent or minimize the release of hazardous substances," and unless

"remedial action" meeting this requirement has begun, the statute-of-limitations-triggering event cannot occur. 42 U.S.C. § 9601(24) (emphasis added). Critically, Olin's earlier actions at the landfill were not consistent with the "permanent remedy" for the site—namely, the final remedial plan implemented by the federal EPA. Indeed, in adding topsoil and clay covers to prevent soil erosion and in changing the slope gradient of the site, Olin's interim measure was inconsistent with the federal EPA's remedial plan. The final plan called for Olin to dismantle its previous work at the site by removing the clay cap, excavating the site and removing and incinerating waste and contaminated soil from the site. D. Ct. Op. at 29. For this reason, "the prior work was not 'permanent' as would be required for a remedial action, nor was it consistent with the remedy mandated by the EPA in the 1990 [unilateral order]." *Id.*

In addressing this issue, the Ninth Circuit has concluded that "the initiation of physical on-site construction of the remedial action" under 42 U.S.C. § 9601(24) and § 9613(g)(2) "can only occur after the final remediation plan is adopted" and that action taken before the plan adoption cannot constitute "remedial action" for statute-of-limitations purposes. *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.,* 358 F.3d 661, 667 (9th Cir. 2004) (emphasis added); *see also* 42 U.S.C. § 9617 (outlining procedures for proposing and adopting a final remedial action plan). While other circuits have rejected this bright-line rule, they adhere to the principle that for a "remedial action" to begin, the work must be "consistent with [the] permanent remedy." *See Geraghty & Miller,* 234 F.3d 917; *United States v. Navistar Int'l Transp. Corp.,* 152 F.3d 702 (7th Cir. 1998). We need not decide today whether to adopt the Ninth Circuit's bright-line rule because it would not affect the outcome of this case. In this instance, Olin's work in the

1980s at Big D was not consistent with the EPA-ordered final remedial plan, irrespective of the timing of the work, and GenCorp offers no argument otherwise. Under these circumstances, Olin's actions in the 1980s did not trigger the statute of limitations for recovery of its costs related to its "remedial" actions over a decade later.

IV.

Turning to Olin's contribution claim, the parties agree that several preconditions for CERCLA liability have been established: (1) the Big D site is a "facility" under 42 U.S.C. § 9601(9); (2) a "release" of "hazardous substances" (the TDI residue) occurred; and (3) the release caused Olin to incur "necessary costs of response," *see* 42 U.S.C. § 9607(a). *See* Stip. of Parties at JA 121; *Centerior*, 153 F.3d at 347-48. The only element of CERCLA liability in dispute is whether GenCorp falls into one of four categories of "potentially responsible parties" described in CERCLA § 107(a)(1)-(4).

Invoking § 107(a)(3) of CERCLA, the district court concluded that GenCorp was an "arranger" of hazardous waste disposal: a "person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3). In reaching this conclusion, the district court embraced two alternative theories of "arranger" liability: (1) that the relationship Olin formed with GenCorp created a single "person" under 42 U.S.C. § 9601(21)—as an "association" or a "commercial entity"—such that Olin's actions regarding hazardous waste disposal could be attributed to GenCorp; and

(2) GenCorp "arranged for disposal" of hazardous waste in its own right as a separate potentially liable "person." D. Ct. Op. at 30, 47.

GenCorp challenges each of these conclusions on appeal. Because we conclude that GenCorp "arranged for" hazardous waste disposal in its own capacity, we need not address the separate question whether the two companies formed an "association" or "commercial entity" under 42 U.S.C. § 9601(21).

A.

CERCLA imposes liability on any person who "arrange[s]" "by contract, agreement or otherwise" for the "disposal or treatment . . . [or] for transport for disposal or treatment" of "hazardous substances" that is "owned or possessed" by that person. 42 U.S.C. § 9607(a)(3). While the legislation does not define what it means to "arrange" for disposal of waste, traditional definitions of the word, its statutory context and case law supply ample clues. To "arrange" for something means to "plan or prepare" for it, though not necessarily to implement the plan. *Webster's II New College Dictionary 62* (2001). Making such preparations, moreover, does not require a formal disposal agreement, as the statute provides that a person may arrange for hazardous waste disposal "by contract, agreement or otherwise." 42 U.S.C. § 9607(a)(3) (emphasis added). Neither must the arrangements for waste disposal stem from a discrete event; they may arise from a broader "transaction." *See United States v. Cello-Foil, Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996).

Circuit precedent also makes clear that one may not become an arranger through inadvertence. The party must

have some intent to make preparations for the disposal of hazardous waste, though that intent goes to the matter of disposing waste generally, not to disposing of it in a particular manner or at a particular location. *See id.* at 1231-32 ("[O]nce it has been demonstrated that a party possessed the requisite intent to be an arranger, the party cannot escape liability by claiming that it had no intent to have the waste disposed in a particular manner or at a particular site."); *United States v. Aceto Agricultural Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *see also CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991); *cf. United States v. Township of Brighton*, 153 F.3d 307, 315 (6th Cir. 1998) (noting that it is "no defense" to operator liability that the "actor [was not] responsible for a *particular* hazard"). The requisite intent may be "inferred from the totality of the circumstances," *Cello-Foil*, 100 F.3d at 1231, and need not depend on the parties' own characterizations of their transactions, *Aceto*, 872 F.3d at 1381—all of which makes this inquiry highly fact-driven, *Cello-Foil*, 100 F.3d at 1231.

Measured by these requirements, the district court correctly concluded that GenCorp arranged for the disposal of hazardous waste from the TDI Plant. GenCorp and Olin entered into the 1962 Agreement to build a manufacturing plant that would convert TDA (which Olin would produce) into TDI (which GenCorp would purchase and use in its own production of urethane foam). The generation of toxic waste was a natural byproduct of this manufacturing process. And even if GenCorp somehow did not realize that this process would generate hazardous waste when it entered into the contract (because Olin held the patent for the process), it necessarily appreciated this reality when it approved the plant design specifications and capital expenditure requests. The construction plans specifically provided that the hazardous

waste generated by the TDI Plant would be placed in drums and buried at an offsite location.

Other facts found by the district court show that the parties' business arrangements for the TDI Plant encompassed plans or preparations for waste disposal: (1) the TDI Committee (whose membership included equal numbers of representatives from Olin and GenCorp) discussed TDI residue disposal; (2) GenCorp Committee members in particular researched and recommended waste disposal locations; (3) the TDI Committee approved methods to reduce the volume of waste sent offsite (i.e., to the Big D landfill) through capital improvements to the plant; and (4) Olin and GenCorp both funded research aimed at further reducing the volume of residue waste that needed to be disposed offsite. See D. Ct. Op. at 45-46. Considered together, these facts amply show that GenCorp "intended to" (and actually did) "enter into a transaction that included an 'arrangement for' the disposal of hazardous substances." *Cello-Foil,* 100 F.3d at 1231; *accord Carter-Jones Lumber Co. v. Dixie Distributing Co.,* 166 F.3d 840, 845 (6th Cir. 1999).

B.

GenCorp's arguments to the contrary amount to variations on two themes: (1) GenCorp did not actively participate in arranging for the waste disposal at Big D and (2) GenCorp did not "own or possess" the hazardous waste. Neither argument is convincing.

In advancing its first argument, GenCorp leans heavily on *United States v. Bestfoods,* 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), and this Court's interpretation of the decision in *Carter-Jones,* 166 F.3d 840, and in *Township of Brighton,* 153 F.3d 307. To GenCorp's way of thinking,

Bestfoods, Carter-Jones and *Township of Brighton* require a party "to actually dispose of hazardous waste," something that GenCorp allegedly never did. GenCorp Br. at 24.

This trio of cases does not bear the weight that GenCorp places on them. *Bestfoods* dealt with a parent company's potential liability under 42 U.S.C. § 9607(a)(2) as an "operator" of a polluting facility owned and operated by its subsidiary. 524 U.S. at 55. The Court rejected the proposition that a parent corporation's participation in and control over its subsidiary's operations "without more" sufficed for operator liability. *Id.* The Court instead held that for liability to attach either the corporate veil must be pierced or the parent must independently meet the test for operator liability through actions in its own capacity, not its subsidiary's. *Id.*

Carter-Jones took the logical next step of extending *Bestfoods* to an individual corporate shareholder facing potential arranger liability under CERCLA § 107(a)(3). 166 F.3d at 846-47. In doing so, it concluded that the district court's findings "satisf[ied] the *Bestfoods* requirement that an officer be actively involved in the arrangements for disposal before individual liability may be imposed." *Id.*

Township of Brighton applied the *Bestfoods* principle in the context of a governmental entity's potential liability as an "operator" of a waste facility. It concluded that "we apply the same plain-meaning standard articulated in *Bestfoods* to any context, whether the defendant is acting in a corporate, governmental, or any other capacity." 153 F.3d at 314 n.7.

The central lessons of these cases are (1) that CERCLA does not alter the corporate-law principle that, in the absence of a valid reason for piercing the corporate veil, a parent corporation is not liable for the acts of its subsidiaries, and

(2) an alleged violator must independently satisfy the test for CERCLA liability—whether for operator liability, as in *Bestfoods*, or for arranger liability, as in *Carter-Jones*. The cases, however, do not alter the basic principles for ascertaining "arranger" liability. The references in these cases to "active involvement" or "actual control" relate either to the substantive standard for operator liability, *Bestfoods*, 524 U.S. at 66-67; *Township of Brighton*, 153 F.3d at 314, or refer to the notion that an entity must itself be involved as an "operator" or an "arranger," *Carter-Jones*, 166 F.3d at 846-47. Nowhere in these cases is there any suggestion that a party must have been "actively involved" in arranging to dispose of hazardous waste at a particular location and in a particular manner. All of this means that even if Olin rather than GenCorp specifically engaged Benjamin Brenkus' hauling services to carry the hazardous waste to Big D, *see* GenCorp Br. at 30-31, that fact does not insulate GenCorp from liability for "arrang[ing] for" the disposal of hazardous waste.

GenCorp's second argument fares no better. In claiming that it cannot be liable as an "arranger" unless it "owned or possessed" the hazardous waste (the contaminated residue and vacuum-pump oils), GenCorp points out that the district court never found that it had title to or physically held the waste but found only that it had a "nexus" to the waste. As an initial matter, however, the company bears some responsibility for this omission (if indeed it was an omission). GenCorp did not squarely join this issue at the district court level, and it cannot fairly criticize the district court for failing to address an issue it never directly raised. *See* GenCorp Post-Trial Br. at JA 222-24 (arguing that disposal activities of hourly TDI Plant employees on its payroll did not satisfy arranger liability requirements); *PACAAR Inc. v. TeleScan Technologies, L.L.C.*, 319 F.3d 243, 258 (6th Cir. 2003).

The legal argument, at any rate, is mistaken. Section 107(a)(3) of CERCLA, it is true, imposes liability on "any person who . . . arranged for disposal . . . of hazardous substances *owned or possessed* by such person." 42 U.S.C. § 9607(a)(3) (emphasis added). But to say that the statute requires ownership or possession of the waste does not establish what evidence will satisfy the requirement or, more particularly, whether constructive ownership or possession will suffice.

When Congress enacted CERCLA in 1980, it did so against a statutory and common-law backdrop that had long dignified constructive ownership as a legitimate means by which to establish criminal and other forms of liability for individuals and entities that did not have title to or physically possess certain items. *See, e.g., United States v. Crippen,* 459 F.2d 1387, 1388 (3d Cir. 1972) ("constructive" possession—"dominion and control over the [] substance"—may satisfy the possession requirement in 21 U.S.C. § 841); *United States v. Hutchinson,* 488 F.2d 484, 488 (8th Cir. 1973) (possession in § 841 may be "actual or constructive"); *United States v. Poore,* 594 F.2d 39, 43 (4th Cir. 1979) (accepting constructive possession as satisfying 26 U.S.C. § 5861(d)'s possession requirement); *State v. Wolery,* 46 Ohio St. 2d 316, 348 N.E.2d 351, 360 (Ohio 1976) ("The prevailing rule at common law and in most jurisdictions is that actual physical possession is not a requisite of receiving [stolen property]. Possession may be constructive.") (quotation marks omitted); *People v. Mumford,* 60 Mich. App. 279, 230 N.W.2d 395, 396-97 (Mich. App. 1975) ("possession" element in a drug offense "is to be construed in its commonly understood sense and may encompass both actual and constructive possession"); *Duchac v. State,* 505 S.W.2d 237, 240-41 (Tenn. 1973) (it "appears to be the general rule throughout the United States" that "effective

control" over burglary tools satisfies the possession requirement for that offense).

Under these circumstances, courts quite appropriately infer that Congress meant the phrase "ownership or possession" to include constructive ownership or possession. *See Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (quotation omitted); *cf. Overstreet v. North Shore Corp.,* 318 U.S. 125, 63 S. Ct. 494, 87 L. Ed. 656 (1943) (interpreting statutory phrase by reference to its meaning in another statute); *see generally* 2B Norman J. Singer, *Sutherland on Statutory Construction* § 53.03 (5th ed. 1992) ("It is well established that the interpretation of a doubtful statute may be influenced by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships.").

In imposing arranger liability on companies under CERCLA, other circuits have accepted less than legal title or physical possession. *See United States v. Shell Oil Co.,* 294 F.3d 1045, 1058 (9th Cir. 2002) (accepting the premise that "parties who did not literally own or physically possess hazardous waste at the time it was disposed of or released" may be liable); *Catellus Dev. Corp. v. United States,* 34 F.3d 748, 752 (9th Cir. 1994) (considering ownership or control to be "evidence" of, but not a precondition for, arranger liability); *United States v. Northeastern Pharm. & Chem. Co., Inc.,* 810 F.2d 726, 743 (8th Cir. 1986) ("[R]equiring proof of personal ownership or actual physical possession of hazardous substances . . . would be inconsistent with the broad remedial purposes of CERCLA."); *see also Geraghty*

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& Miller, 234 F.3d at 929 (stating that a "nexus"—*i.e.*, an obligation to control the hazardous waste—must exist). As these cases indicate, *control* over the hazardous waste may suffice where literal ownership or possession falls short. *See Shell Oil,* 294 F.3d at 1058 (summarizing that courts have not imposed arranger liability without *either* ownership of the waste or "authority to control or duty to dispose of" hazardous waste) (citing *United States v. Iron Mt. Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Colo. 1995)); *Northeastern Pharm.*, 810 F.2d at 743-44 (individual corporate officer's "actual control" satisfied the statute's possession requirement); *CPC Int'l,* 759 F. Supp. at 1278 ("section 107(a)(3) requires the assumption of responsibility for or control over the disposition of hazardous waste" rather than legal title).

For several reasons, GenCorp's control over the hazardous waste suffices to establish constructive ownership and possession. First, even if GenCorp never held title to the TDI Plant, it had an active interest in the facility through its option to buy the plant, secured by its "earnest money"—its contribution of one half of the construction costs. Second, GenCorp had *equal* representation on the Committee that oversaw "the construction, operation and management of the TDI Plant." Third, the Committee approved the design plans, capital appropriations requests and the budgets of the TDI Plant, all of which contemplated continued offsite waste disposal. Indeed, on the basis of these facts, among others, the district court permissibly concluded that GenCorp was an "operator" of the TDI Plant by "managing, directing, or conducting operations specifically related to pollution," D. Ct. Op. at 42-43. Surely a person who "manages" activities "specifically related to pollution" at a plant exercises control over the waste disposal process.

These facts and the district court's fact finding also show that GenCorp and Olin did not have a traditional buyer-seller relationship. Contrary to GenCorp's concerns, in other words, our decision does not mean that mere customers of waste-generating manufacturers or processors will face "arranger" liability under CERCLA—unless, that is, they exercise control over the hazardous waste and its disposal as GenCorp did in implementing this unique business relationship. *See Morton Int'l, Inc. v. A.E. Staley Mfg., Co.*, 343 F.3d 669, 683 (3d Cir. 2003); *Shell Oil*, 294 F.2d at 1057; *Concrete Sales & Servs., Inc. v. Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir. 2000); *Gen. Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 287 (2d Cir. 1992).

GenCorp, lastly, appears to argue that even if the evidence establishes its "arranger" status under the 1962 Agreement with Olin, the evidence does not support the district court's finding of arranger liability after the parties unwound the agreement (effective October 1, 1973). *See* GenCorp Br. at 40. While that argument may well have force—particularly since GenCorp's involvement in oversight of the TDI Plant ended in 1973—GenCorp does not address the district court's conclusion that post-1973 activities would not have made a material difference to the cost allocation in view of the extent of contamination at Big D that had already taken place by that time. *See* D. Ct. Op. at 55. Accordingly, we reject this claim.

V.

Both parties challenge the district court's allocation of costs. In its cross-appeal, Olin challenges the district court's allocation of liability for the Big D clean-up (70% Olin, 30% GenCorp), claiming that it should have evenly divided the

costs between the two companies. According to Olin, the district court abused its discretion in allocating costs, by improperly considering two factors: (1) Olin's several-year delay in giving notice to GenCorp of the federal EPA's involvement at the Big D site, and (2) Olin's relatively greater authority over the TDI Plant under the parties' 1962 Agreement.

Olin must run uphill in making this argument. Abuse-of-discretion review applies to the district court's allocation of costs. *See United States v. Consolidation Coal Co.*, 345 F.3d 409, 412 (6th Cir. 2003). And the statute augments that discretion by saying that the court "may allocate response costs . . . *using such equitable factors as the court determines are appropriate,*" 42 U.S.C. § 9613(f)(1) (emphasis added). Even if Olin is correct that it had no legal duty to notify GenCorp before beginning to clean up the site, *see* Olin Br. at 63, the district court permissibly considered the fact that "Olin foreclosed GenCorp from cooperating with the regulatory authorities during years of negotiation . . . and then, after extensive clean-up work was underway . . . called upon GenCorp to be a partner in cost-sharing as a *fait accompli.*" D. Ct. Op. at 53. The nature of the remediation plan and the costs associated with it assuredly could have been affected by the participation of a third party who knew the facility first hand. That we will never know the answer to that question with certitude, however, is precisely why the defense of laches exists and why this factor bears a similarity to that "equitable" defense. *See United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991) (noting that under CERCLA § 113(f)(1) a court may consider "any factor it deems in the interest of justice in allocating contribution recovery . . . . No exhaustive list of criteria . . . should be formulated . . . . [but] [a] court may consider . . . any traditional *equitable* defenses") (emphasis added).

GenCorp similarly challenges the district court's allocation of liability with respect to the Fields Brook site (60% Olin, 40% GenCorp). But because GenCorp raised this issue for the first time in its reply brief and because GenCorp failed even to develop the argument there, we need not consider it here. *See Priddy v. Edelman,* 883 F.2d 438, 446 (6th Cir. 1989).

VI.

GenCorp next argues that even if we affirm the district court's judgment as to its contribution liability (which we do), we must reverse the award of prejudgment interest to Olin. In doing so, it raises two challenges to the district court's analysis: (1) the trial court erroneously believed that prejudgment interest in a CERCLA contribution action is mandatory, and (2) Olin's "inexplicable delay" in bringing the suit "eliminate[d]" its claim for such interest. GenCorp Br. at 60.

The terms of the statute and recent case law foreclose both arguments. An award of prejudgment interest—whether in a joint and several liability action under § 107 or a contribution action under § 113 of CERCLA—is mandatory and the statute makes no exception for late claims. *See* 42 U.S.C. § 9607(a) ("The amounts recoverable in an action under this section *shall* include interest on the amounts recoverable under [other provisions].") (emphasis added); *Consolidation Coal,* 345 F.3d at 415 (deciding, in the context of a contribution action, that "[a]n award of prejudgment interest . . . is mandatory"); *see also Township of Brighton,* 153 F.3d at 321 (interest is mandatory in a § 107 action). The district court accordingly did not abuse its discretion in awarding prejudgment interest on this claim.

VII.

In its cross-appeal, Olin also claims that the district court should have "entered a declaratory judgment finding [GenCorp] liable for Olin's allowable response costs incurred after December 31, 1999, at the previously-determined percentage share for each site." D. Ct. Op. of Jan. 22, 2003, at JA 602. Section 113(g)(2), the relevant statute, provides as follows: "In any [] action described in this subsection, the court *shall* enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent . . . actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2) (emphasis added). Case law confirms that the words mean what they say. In the context of a § 107 action, this Court has held that "the entry of declaratory judgment as to liability is mandatory." *Kelley v. E.I. DuPont De Nemours & Co.*, 17 F.3d 836, 844 (6th Cir. 1994). GenCorp responds that whether declaratory relief as to future liability in a *contribution suit* is mandatory is an open question in this circuit—one on which other courts have divided—and that awarding declaratory relief is inherently a "discretionary" function of district courts. GenCorp Reply Br. at 53.

We agree with Olin insofar as it claims that requests for declaratory judgments concerning future response costs in § 107 and § 113(f) suits must be treated alike. The sections governing contribution "work in conjunction" with the liability provisions of § 107(a), as "parties seeking contribution" must turn to " § 107 to establish the basis and elements of liability of the defendants." *Centerior*, 153 F.3d at 350; *see also Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523, 531-32 (4th Cir. 1998) (determining, in a contribution action, that a court must enter declaratory relief as to future response costs where liability for existing costs is

established); *AlliedSignal v. Amcast Int'l Corp.*, 177 F. Supp. 2d 713, 757 (S.D. Ohio 2001).

Entry of a declaratory judgment, however, cannot be fully mandatory. Under Article III of the United States Constitution, "Congress cannot create a right of action where no case or controversy otherwise exists." *Kelley,* 17 F.3d at 844. In order to satisfy the "case or controversy" requirement, "a party seeking declaratory relief must allege facts to support a likelihood" that it will incur future costs recoverable under CERCLA. *Id.* at 845. Based on the record before us, we are unable to find sufficient evidence of future response costs to satisfy the "case or controversy" requirement. Therefore, we remand this jurisdictional issue to the district court for initial consideration of whether a "case or controversy" exists, and if so, for the entry of a declaratory judgment for future response costs.

VIII.

For these reasons, we affirm the district court's judgment as to GenCorp's contribution liability and its (and Olin's) relative shares of the remediation costs. We remand, however, for a determination by the district court whether a "case or controversy" exists with respect to continuing clean-up costs, and if that jurisdictional requirement is satisfied, for the entry of a declaratory judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:93CV2269

[Filed July 14, 1999]

GenCorp, Inc.,	)
Plaintiff/Counter-defendant	)
	)
v.	)
	)
Olin Corporation,	)
Defendant/Counter-plaintiff	)
	)

Magistrate Judge David S. Perelman

MEMORANDUM OPINION AND ORDER

Currently pending are the remaining counter-claims[1] of Olin Corporation (hereinafter "Olin") filed against GenCorp, Inc. (hereinafter "GenCorp")[2] under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607(a) (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) seeking contribution from GenCorp under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f) and 29 U.S.C. § 2201, "for at least fifty percent of the response costs incurred by Olin" as well as a declaratory judgment that pursuant to CERCLA §§ 107(a) and 113(f) "GenCorp is jointly and severally liable for all damages and response costs" (Count IV), and under CERCLA Section 113(g), 42 U.S.C. § 9613(g)(2) and 29 U.S.C. § 2201, seeking a declaratory judgment that "GenCorp is liable for at least fifty

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[1] Count I of the complaint, which sought to compel arbitration of the issues raised herein, was nullified by an order entered by Judge George W. White on January 20, 1994 in which he denied the motion of Olin to compel arbitration and held that the parties were "enjoined from any further arbitration of this matter." Count II was dismissed in an order dated February 24, 1999, in which this Court held that parties who themselves are PRPs potentially liable under CERCLA and compelled to initiate a hazardous waste site cleanup may not bring an action for joint and several cost recovery and are limited to actions for contribution governed by the mechanisms set forth in CERCLA § 113(f).

[2] For ease of reference herein GenCorp, Inc., which was formerly known as the General Tire and Rubber Company will be referred to as "GenCorp" and Olin Corporation, which was formerly known as Olin Mathieson Chemical Corporation, will be referred to as "Olin."

percent of the response costs incurred and to be incurred by Olin" (Count III).

The factual and procedural background of this case are as follows.

GenCorp's manufacturing of urethane foam in the 1960's required as a critical ingredient large amounts of toluene di-isocyanate ("TDI"), and GenCorp investigated potential suppliers in an attempt to reduce its manufacturing costs. In so doing, it entered into negotiations with Olin, as Olin had developed and held patents on a more cost-effective process for manufacturing TDI. That process was considered to be complex and dangerous, as it involved the use of toxic phosgene gas, commonly know as "mustard gas."

On December 1, 1961, the parties entered into an agreement calling for protection of certain business secrets which would be disclosed during discussions to be undertaken in pursuit of a "joint enterprise" for the manufacture of TDI. On December 12, 1961 they entered into another agreement ("the 1961 Agreement") which basically provided that the parties would share the costs of jointly constructing a TDI Plant and each would have a 50% undivided interest in the plant, as illustrated in the following contract language.

> **Article II. Section A**: ...[e]ach party shall have a 50% undivided interest in the plant and in all related facilities erected or acquired jointly by the parties and shall bear 50% of all costs entailed in the design, construction, or acquisition and start-up of such plant and facilities.
>
> **Article IV. Section A**: ...the TDI Plant will be operated for the benefit and account of General and

> Olin until the parties agree upon termination of the joint operations or until otherwise terminated as provided herein. A committee (the Committee) consisting of an equal number of representatives of General and Olin will have responsibility for the management of the construction and operation of the TDI Plant. The Committee will adopt and be governed by its own rules of procedure. The chairmanship of the Committee will rotate annually between General and Olin. The Committee will select a plant manager and a staff to supervise the day-to-day operations of the plant. Full-time plant personnel will be on the payroll of General or Olin respectively and will be entitled to the normal employee benefits of the particular employer which makes their services available.

That agreement further provided that each party would be entitled to 50% of the production capacity of the TDI Plant, with variable costs to be allocated in proportion to the TDI removed from the plant by each party. While the agreement provided for the parties to jointly expand the plant, to the extent that only one party sought to do so that party would bear the costs of expansion.

With regard to disposal of the waste by-product of manufacturing TDI, which included hazardous substances such as hydrochloric acid, the agreement provided:

> [T]he parties will use their best efforts to arrange for the economical disposition of the hydrochloric acid....Proceeds or costs of such disposal of acid will be allocated to the parties during any year in the ratio in which the parties take TDI during such year.

During the course of the next six months, the parties exchanged drafts of revisions to the aforementioned agreement, beginning with the following (in which the revisions are underlined and replacement language appears in parenthesis):

A. Olin will erect or cause to be erected, at its cost and expense, at a location adjacent to General's PVC plant at Ashtabula, Ohio, a plant for the production of Toluene Di-Isocyanate (TDI) from Toluene.

(IV A) II. OWNERSHIP OF PLANT (OPERATION)
(Except as specifically other wise provided herein, the TDI Plant will be operated for the benefit and account of General and Olin until the parties agree upon termination of joint operations or until otherwise terminated as provided herein.) A. the TDI Plant will be owned and operated by Olin until such time as General takes title thereto as hereinafter provided. Olin agrees to train and teach General's assigned personnel in the know-how of Olin's process for producing from TDA in the TDI Plant, and in the operation and management of the TDI Plant. See old IV A.
(A) Olin will establish a consulting committee (the Committee) consisting of an equal number of representatives of Olin and General (will have responsibility for the management of the construction and operation) to oversee the construction, operation and management of the TDI Plant to the end that General's management, staff and workmen assigned to the TDI Plant operation will be throughly familiar with the Olin process and the

operation and management of the TDI Plant. The committee will adopt and be governed by its own rules of procedure. (The Chairmanship of the Committee will rotate annually between General and Olin.) Olin (The Committee) will select a (Plant) Manager for the plant and a staff to supervise the day-to-day operation of the plant, consulting with the Committee. Full-time plant personnel will be (on the payroll of) supplied by General and Olin (respectively) and will remain on the payroll of, and will be entitled to the normal employee benefits of the (particular) respective employer (Company which makes their services available) as the case may be. All such costs, (for such personnel) including (costs of) fringe benefits, will be charged to the (operation) cost of the TDI Plant operation. B. The parties contemplate that (each of them) General may be requested to furnish certain services (such as maintenance, accounting and purchasing) required in connection with the operation of the TDI Plant, (if it should appear that such services can be performed more economically in this manner.) (The cost of such services would be subject to negotiation between the parties.) Any such services rendered or made available by General shall be at General's cost.

Another revision sent by Olin to GenCorp on or about May 29, 1962, included a provision that the plant would be constructed at the sole expense of Olin and another stating that the real estate taxes on the property would also be Olin's responsibility. Another significant change to the contract language appeared in Article IV, with GenCorp now

purchasing TDI from Olin with the purchase price to be based upon 50% of the fixed cost of the plant. The revised Article IV was as follows:

IV. OUTPUT OF TDI

A. For the period of time that title to the TDI Plant remains in Olin as herein elsewhere specified, Olin agrees to make available to General, for purchase, fifty per cent (50%) of the actual output capacity of the TDI Plant. General will be entitled to purchase any capacity not utilized at any time by Olin. For purposes of this Article, actual capacity is assumed to be 20,000,000 pounds per year. If the actual capacity should be more or less than 20,000,000 pounds, the figures which appear below will be adjusted to reflect this difference.

B. The parties will agree upon the classification of all costs into the categories of fixed or variable costs.

C. General agrees to pay a purchase price for the TDI computed as follow: Prior to the time the TDI Plant goes on stream, an amount equal to one half of all operating expense of the TDI Plant and related facilities. After the TDI Plant goes on stream, an amount equal to fifty per cent (50%) of the fixed costs, including depreciation, in any contract year in which neither General purchases or Olin takes more than 10,000,000 pounds of TDI from the TDI Plant. After the TDI Plant does on stream, if General purchases more than 10,000,000 pounds during any contract year, General will pay a purchase price in cash to Olin as a use charge an amount equal to an additional one per cent (1%) for quantities of less than

200,000 pounds. After the plant goes on stream, if Olin should take more than 10,000,000 pounds of TDI from the TDI Plant during any contract year, General will be relieved of its requirement to pay as a purchase price fifty per cent (50%) of the fixed costs to the extent of one per cent (1%) of the total fixed costs for such year for each additional 200,000 pounds of TDI taken by Olin and an appropriate fraction of one per cent (1%) for quantities of less than 200,000 pounds.

Article II, Section A was revised to read in part:

...Olin will establish a committee (the Committee) consisting of two (2) representatives each of Olin and General for construction, production and financial responsibility of the TDI Plant to the end that General's staff and workmen assigned to the TDI Plant operation will be thoroughly familiar with the Olin process and operation of the TDI Plant...Olin, in connection with the Committee, will select a manager for the plant and a staff to supervise the day-to-day operation of the plant.

Another proposed draft from GenCorp dated, June 1, 1962 and marked "final," included in part the following revisions to Article II, Section A:

...Olin will establish a committee (the Committee) consisting of two (2) representatives each of Olin and General to supervise and control construction and operation of the TDI Plant. Olin agrees General's staff and workmen assigned to the TDI Plant operation will be made thoroughly familiar with the Olin process and the operation of the TDI Plant...Olin, in conjunction

with the Committee, will select a manager for the plant and a staff for the day-to-day operation of the plant.

That was not to be the final draft, as Olin sent to GenCorp further amendments to the proposed contract language, dated June 14, 1962. Olin's new proposed contract language omitted the Committee's obligation to "supervise and control" the construction and operation of the plant and substituted the responsibility to "oversee" the construction, operation and management of the plant. Most significantly, the new language would empower Olin to independently select the management of the plant, provided that there had been "consultation" with the Committee. Article II. Section A was revised in part as follows:

> ...Olin will establish a committee (the Committee) consisting of an equal number of representatives of Olin and General to oversee the construction, operation, and management of the TDI Plant. Olin agrees that General's staff and workmen assigned to the TDI Plant operation will be made thoroughly familiar with the Olin process and the operation and management of the TDI Plant... Olin, after consulting with the Committee, will select a manager for the plant and a staff to supervise the day-to-day operation of the plant.

Final agreement was reached on June 21, 1962 ("the 1962 Agreement"). The final version of Article II, Section A paralleled the language of the June 14th draft which omitted the Committee's ability to "supervise and control" the construction and operation of the TDI Plant. In addition, Olin was to select a Plant Manager, as well as staff to supervise the

day-to-day operations of the plant. The 1962 Agreement provided in pertinent part:

I. LOCATION AND CAPACITY OF PLANT

A. Olin will erect or cause to be erected, at its sole cost and expense, at a location adjacent to General's PVC plant at Ashtabula, Ohio, a plant for the production of Toluene Di-Isocyanate (TDI) from Toluene Di-Amine (TDA), having an annual design capacity of 20,000,000 pounds of TDI, at an estimated cost of $4,500,000, exclusive of steam.

B. The TDI Plant will be located on land owned by General, which site shall be suitable for erection and operation of the TDI Plant and of sufficient size to allow for future expansion (shown on Exhibit "A" attached)...Real estate taxes and special assessments assessed against the land licensed herein and the improvements being placed thereon shall be charged to Olin from the signing hereof until the transfer date....

*****

II. OWNERSHIP OF PLANT

A. The TDI Plant will be owned and operated by Olin until such time as General takes title thereto as hereinafter provided. Olin agrees to train and teach General's assigned personnel in the know-how of Olin's process for producing TDI from TDA in the TDI Plant, and in the operation and management of the TDI Plant. Olin will establish a committee (the Committee) consisting of an equal number of

representatives of Olin and General to oversee the construction, operation and management of the TDI Plant. Olin agrees that General's staff and workmen assigned to the TDI plant operation will be made thoroughly familiar with the Olin process and the operation and management of the TDI Plant. The Committee will adopt and be governed by its own rules of procedure. Olin, after consulting with the Committee, will select a manager for the plant and a staff to supervise the day-to-day operation of the plant. Full-time plant personnel will be supplied by General and Olin and will remain on the payroll of and will be entitled to the normal employee benefits of the respective employer, as the case may be. All such costs, including fringe benefits, will be charged to the cost of the TDI Plant operation....

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IV. OUTPUT OF TDI

A. For the period of time that title to the TDI Plant remains in Olin as herein elsewhere specified, Olin agrees to make available to General, for purchase, fifty per cent (50%) of the actual output capacity of the TDI Plant. General will be entitled to purchase any capacity not utilized at any time by Olin. For purposes of this Article, actual capacity is assumed to be 20,000,000 pounds per year. If the actual capacity should be more or less that 20,000,000 pounds, the figures which appear below will be adjusted to reflect this difference.

*****

C. Prior to the time the TDI Plant goes on stream General agrees to purchase fifty per cent (50%) of the actual output of TDI produced therein at a purchase price equal to one-half (½) of all Olin's operating expenses (including start-up) of the TDI Plant and related facilities. After the TDI Plant goes on stream, General agrees to pay Olin, during such time as title to the TDI Plant remains in Olin, in addition to the variable costs of what-ever quantities of TDI General may purchase from Olin, an amount equal to fifty per cent (50%) of the fixed costs of the TDI Plant and related facilities (including amortization), in any contract year in which neither General purchases nor Olin takes more than 10,000,000 pounds of TDI from the TDI Plant. After the TDI Plant goes on stream, if General purchases more than 10,000,000 pounds during any contract year, General will, in addition, pay in cash to Olin as a use charge an amount equal to an additional one per cent (1%) of the total fixed costs for such contract year for each additional 200,000 pounds of TDI purchased by General and an appropriate fraction of one per cent (1%) for quantities of less than 200,000 pounds. After the TDI Plant goes on stream, if Olin should take more than 10,000,000 pounds of TDI from the plant during any contract year, General will be relieved of its requirement to pay fifty per cent (50%) of the fixed costs to the extent of one per cent (1%) of the total fixed costs for such contract year for each additional 200,000 pounds of TDI taken by Olin and an appropriate fraction of one per cent (1%) for quantities of less than 200,000 pounds.

While GenCorp agreed to purchase fifty percent of the TDI Plant output, which Olin would sell at its cost, Olin had the

right to sell the remaining fifty percent to other purchasers at a cost within Olin's discretion, and had no obligation to share the profits from such sales with GenCorp.

The 1962 Agreement further provided that GenCorp would advance to Olin one-half of Olin's capital cost as earnest money consequent to its promise to purchase the plant within three to five years, with GenCorp to earn interest on that advance. In the event that the anticipated transfer of the plant did not occur, GenCorp was to be reimbursed. Until the time of transfer of title to the TDI Plant Olin was obligated to "insure the TDI Plant for all risk of loss, liability and damage to property and facilities in accordance with Olin's normal policy and mutually agreed between the parties[.]" The plant was to be constructed on land owned by GenCorp adjacent to GenCorp's PVC plant located in Ashtabula, Ohio.

Pursuant to the 1962 Agreement Olin was also obligated to construct a Toluene Di-Amine ("TDA") plant which would supply TDA to the TDI Plant.[3] While Olin was obligated to disclose to GenCorp information "on the economics of its process for the manufacture of...TDA," there was no obligation to provide to GenCorp actual process information relating to TDA. Prior to the contemplated transfer of ownership of the TDI Plant TDA would be "charge[d] in" by Olin to the TDI Plant operations and after the date of transfer Olin would sell TDA to GenCorp, while remaining free to sell TDA to third parties.

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[3] TDA is a critical component in the manufacturing of TDI. Olin was to construct a 16.5 million pound capacity TDA Plant at another location, which turned out to be Doe Run, Kentucky, to supply the TDA requirements of the TDI Plant.

Until GenCorp acquired title of the TDI Plant, it was obligated to purchase from Olin "the entire output of hydrochloric acid from the TDI Plant," to the extent that it could be used in the production of vinyl chloride monomer at GenCorp's Ashtabula PVC plant.[4] Any leftover hydrochloric acid was to be "neutralized or sold by Olin[,]" and the cost of doing so was to be "allocated to the parties during any contact year in the ratio in which the parties purchase and take TDI during such year."

As regarded Olin's expertise in the TDI process, Olin agreed to turn over information as to its "first TDI process," as well as a process under development at the time of the 1962 Agreement. Specifically, Olin was to "[S]upply to the Engineers all process specifications and design data for its TDI process to enable the Engineers to prepare full-scale engineering drawings required for the construction and operation of a TDI Plant embodying said process."

Consistent with Article II A of the 1962 Agreement, the parties entered into a side agreement for the purpose of establishing a TDI Committee "to oversee the construction, operation and management of the TDI Plant." The four-person committee consisted of two members from Olin and two from GenCorp. The Committee Manager, who was to be appointed by Olin, was the only person authorized by the Committee to direct the Plant Manager.

As a consequence of the large quantities of residue wastes generated by the TDI Plant, some of which were "hazardous" (including TDI distillation and spent vacuum pump oils),

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[4] In fact, GenCorp purchased the hydrochloric acid by-product from the TDI Plant until approximately November 29, 1968.

waste disposal became a concern in the early 1960's. In an effort to alleviate disposal issues GenCorp and Olin jointly funded a research program referred to as the "Golden TDI" project, the purpose of which was to develop a commercial use for TDI residue waste. Ultimately the research was unproductive and off-site waste disposal continued.

The TDI Plant was constructed pursuant to the 1962 Agreement and became operational in 1964.

On or about July 23, 1965 Olin and GenCorp entered into an agreement ("1965 Agreement") whereby GenCorp agreed to lease to Olin, for a nominal sum of ten dollars per year, the property upon which the TDI Plant was constructed. Particulars of that agreement included the following:

> Real estate taxes and such assessments assessed against the leased premises and any improvements placed thereon by [Olin] during the term or any extension or extensions hereof, shall be paid for by [Olin].
>
> During the term or any extension or extensions hereof, [Olin] shall, at its own cost and expense, maintain:
>
> > (a) any and all insurance coverages it deems desirable and/or necessary for its improvements on the leased premises, and otherwise, and
> >
> > (b) the leased premises and the improvements placed thereon by [Olin], in reasonably good condition and repair.

> It is mutually agreed between [General Tire] and [Olin] that all improvements placed on the leased premises by [Olin] are and shall remain the property of [Olin] during the term of this lease or any extension or extensions hereof.

The 1965 Agreement paralleled the provision in the 1962 Agreement which described how prior to the date of transfer of the TDI Plant to GenCorp Olin would charge-in the TDA supplied to the TDI Plant and after the transfer would sell the TDA to GenCorp.[5] This new agreement specified a formula meant to lower the costs of TDA so that the overall cost of producing TDI would also be reduced. Trial testimony also reflected that this charge-in procedure was a cost-reducing measure, not a typical purchase/sale of TDA.[6]

During the period of operation of the TDI Plant residue wastes and spent vacuum oils were transported to, and deposited and placed onto, an off-site location referred to in these proceedings by a number of names including "the Big D Site," "the Big D Superfund Site," "the Big D Campground," "the Dreslinski property," "the Brenkus landfill," and "the Creek Road Site."[7] The TDI Plant ceased the disposal of spent vacuum oils to this off-site location at the

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[5] The prefatory language to the charge-in provision was "For the purposes of computing Olin's costs of TDI made available to [GenCorp] for purchase in accordance with the provisions of Article IV below...."

[6] That would also hold true for the TDA pricing side letters submitted into evidence.

[7] For ease of reference in this opinion the site will be referred to as the Big D Site.

end of 1975, and did the same with regard to TDI residues at the end of January of 1976.

In April of 1965, Mr. Robert Laundrie, GenCorp's representative on the TDI Committee, inspected the Big D Site and was sufficiently concerned with the conditions he observed there that he wrote a letter to Mr. George Palmer, the TDI Plant Manager, stating in pertinent part:

> Wednesday, April 7, 1965, Mr. Valentich and myself toured the area where the refuse from the TDI Plant is dumped.
>
> The following inadequacies were noted:
>
> 1. The refuse is not covered daily.
>
> 2. Liquid refuse is being dumped whereas only solids were originally contemplated.
>
> 3. The coverage by earth is unsatisfactory. Drums stick out from the covered portions and parts just never are covered.
>
> 4. The slope of the dumping area is such that liquids flow toward the river. Suitable dams would prevent this flow toward the river.
>
> 5. There are no warning signs to ward off errant children.
>
> 6. The nearest dwelling is about 500 feet from the area.

7. The odor of MCB was heavy. No CO CL2 was noted, but masking by MCB might preclude noting small quantities.

8. The odor of TDI was evident.

From 1964 through October 1, 1973 all State of Ohio Water Pollution Control Board (hereinafter "WPCB") permits pertaining to the TDI Plant were applied for and granted in the name of Olin. In addition, requests for authorization of the expenditure of capital funds at the TDI Plant were prepared by Olin as "capital appropriations requests" (hereinafter "CARs") and submitted to the TDI Committee for approval, and according to evidence of record, were never denied.

In 1970 a distillation column was installed at the TDI Plant to reduce the "ortho content" of the TDA supplied by Olin's TDA plant which, in turn, would reduce the amount of TDI residue waste. Ortho-TDA, a known hazardous substance, caused TDI to be turbid, or milk-like in appearance. Any unsold ortho-TDA was taken to GenCorp's PVC plant and burned in boilers. The new distillation column was functioning by June, so that the residue waste was reduced as of that time.

On September 29, 1970 Olin issued a press release announcing plans for a new TDI Plant at a location in Lake Charles, Louisiana. Construction began in August of 1971, but no TDI was manufactured at that plant until August of 1973.

Mr. Laundrie inspected the Big D Site again in 1971, after which he submitted an inter-organization memorandum stating in part:

Approximately 600,000 pounds of residue per month is being buried in this landfill. The vacuum oil is buried in drums at a rate of 5 to 10 drums per month.

The amount of ground cover could not be determined but the hauler claims at least 2 feet of cover. Whether or not leaching from this dump could cause a problem in the future is unknown but the close proximity to the creek must be considered. The landfill being used is not a state approved landfill operation.

A program is underway to make use of the residue as a by-product for sale; however, I don't expect this to reach fruition for another year.

In April of 1971, Mr. Steven Cupach, TDI Plant Manager, participated on behalf of Olin in a federal grand jury investigation of the pollution of Fields Brook. On May 18th, Olin was indicted for alleged unlawful discharges of suspended solids and chromates into Fields Brook. Two days later, Olin entered a plea of "not guilty" to those charges.

Pursuant to discussions in a meeting held on June 3, 1971, attended by Olin representatives as well as representatives of the WPCB, Olin submitted a written proposal dated July 15, 1971 for the installation of equipment to reduce water pollution discharge from the TDI Plant. Those plans were approved by the WPCB on July 30, 1971.

In an agreement dated September 27, 1971 (hereinafter "1971 Agreement"), Olin and GenCorp agreed that the 1962 Agreement would be terminated as of October 1, 1973. Essentially, Olin bought out GenCorp's right to purchase the Ashtabula TDI Plant, for a sum of $1,650,000.00. Thus, GenCorp was reimbursed its "earnest money," with interest

upon that sum already having been paid to GenCorp on a monthly basis. Olin retained ownership of the TDI Plant and GenCorp extended the lease agreement for the property upon which the plant was located for three additional twenty year terms at the same annual rental rate of ten dollars. That agreement included the following language:

> WHEREAS, Olin is the present owner and operator of industrial facilities for the production of Toluene Di-Isocyanate (TDI) at Ashtabula, Ohio (Plant)...

On that same date the parties entered into a separate agreement, the "TDI Product Sales Agreement," or "TPS Agreement," which was to become effective October 1, 1973, in which GenCorp agreed to purchase, on a yearly basis, "not less than 80% of [GenCorp's] requirements but in no event more that 40,000,000 pounds per annum, unless mutually agreed, of [TDI]...meeting the specifications..." attached to the agreement. The TDI was to be shipped to GenCorp's operations in Indiana, Georgia, California and other mutually agreed upon locations.

The TPS Agreement also provided that all TDI Plant employees on GenCorp's payroll would be removed and transferred to Olin's payroll, and the TDI Committee would cease to exist. The agreement terminated GenCorp's obligation to purchase half of the plant production and, by the end of 1973 GenCorp was no longer Olin's largest customer. GenCorp was to continue to supply steam to the TDI Plant at cost, on a "first priority basis," and to provide purchasing services by way of a local purchasing agent (Mr. Neil Gouhin) with the understanding that he functioned only with Olin's authority.

The TDI Plant continued to generate wastes in the production of TDI after the effective date of the TPS Agreement, which remained in effect until October 1, 1978 when the parties entered into yet another sales agreement.

On June 28, 1971 and September 28, 1971, Olin filed applications with the U.S. Army Corps of Engineers for a discharge permit for the TDI Plant as required by the Refuse Act.

On November 30, 1971, Olin representative L.W. Roznoy met with Mr. John Earl Richards, Chief of the Division of Engineering of the Ohio Department of Health, to address Olin's plans to discontinue operations at the TDI Plant after December 31, 1973. Those plans prompted Olin to request, on July 15, 1971, a release from pollution abatement plans of action previously submitted by Olin. On February 9, 1972 Mr. Roznoy forwarded a "Revised Water Pollution Plan of Action" notifying the State of Ohio that the TDI Plant would cease operations by December 31, 1973 and requesting release of Olin's prior commitment on pollution control actions.

The WPCB issued a proposed "cease and desist order," dated April 14, 1972, to Olin and other companies on Fields Brook, not including GenCorp, and denied the pending applications for renewal of water pollution discharge permits.

The 1971 federal water pollution indictment was resolved on October 27, 1972 by Olin's entry of a nolo plea on three counts and payment of a $1500 fine, with twelve other counts having been dismissed.

During 1974, Mr. Larry Hinson, TDI Plant Manager, prepared two operating reports in which he listed as

problematic the disposal of TDI residue and spent vacuum pump oil from the TDI Plant. Toxicity testing of TDI residue was performed by Olin during 1975.

Well sampling on the Big D Site was performed by Olin as a result of a recommendation made by TDI Plant Manager William McGlasson on August 11, 1978. Less than a week later, the Environmental Affairs Department of Olin's Chemicals Group initiated an investigation of current and past solid waste disposal practices of Chemicals Group facilities. Disposal of chemical wastes from the TDI Plant upon the Big D Site was deemed to be an "area of concern requiring further study." In conducting such further investigation Olin hired Harza Engineering to determine whether any leaching was occurring at the site.

On November 7, 1978 the Ohio Environmental Protection Agency (hereinafter "OEPA") informed Plant Manager McGlasson that mercury had been discovered in water discharged from the TDI Plant. Upon further investigation Olin identified its Niagara Falls plant as a possible source of that contamination.

In December of 1978, Olin once again hired Harza Engineering to conduct tests to determine whether there had been soil and groundwater contamination at the TDI Plant and the Big D Site.

In August of 1979 the Big D Site was referred to in an internal memorandum of the Olin Chemicals Group Environmental Affairs Department as a disposal site with a "serious problem requiring action" as a result of "potential leachate contamination of the adjacent creek and groundwater." Corrective action was recommended.

As required under Section 8(e) of the Toxic Substance Control Act a "substantial risk report" pertaining to the Big D Site was filed on April 14, 1980 by Mr. Coles Phinizy of Olin. That report prompted Olin to convene a substantial risk task force meeting. The task force decided to continue monitoring ground water at the site.

In a letter dated May 21, 1980 the OEPA requested that Olin provide information pertaining to "solid waste streams and volumes of such wastes disposed of by the Olin Ashtabula Plant."

Several months later, in July of 1980, Olin installed dirt on the former fill area at the Big D Site to correct a slope erosion problem.

On June 9, 1981, Olin filed notification required by § 103 of CERCLA that an estimated 28,000 tons of waste had been dumped at the Big D Site.

In October of that same year, Olin ceased operations at the TDI Plant and began cleanup and decontamination of plant equipment and property as well as dismantling of plant facilities.

In a letter dated March 8, 1982 the OEPA requested that Olin provide groundwater monitoring data obtained from the Big D Site.

On March 15, 1982, the US EPA notified Olin (with respect to the TDI Plant), GenCorp (with respect to the PVC plant) and others that they were PRPs at Fields Brook and requested them to advise of their willingness to undertake voluntary action to investigate Fields Brook.

On July 15, 1982 the US EPA approved an interim status hazardous waste closure plan submitted by Olin for the TDI Plant Site. Several months later, on October 4, 1982, the OEPA also approved such a plan for that site.

On November 1, 1982, pursuant to an agreement between Olin and GenCorp, Olin turned over to Pinkerton Guard Service and to GenCorp the "keys and [TDI] plant premises," as reflected in a letter dated November 3, 1982 from Olin Acting Plant Manager, Mr. Bruce Jacobsen, to Mr. Roy L. Jackson of GenCorp. In that letter Olin reserved the right to engage in specific activities on the property for a limited period of time, including the "right to continue earthen excavation where and when it is deemed necessary to alleviate environmental hazards." Olin also informed GenCorp that as regards the spill basin and pond areas, "Olin's certified engineer...along with Ms. Chris Frazier of the OEPA," conducted an inspection and agreed that work upon them had been completed thus "*allowing* [GenCorp] to utilize as long as all OEPA personnel have been notified[.]" (Emphasis added.)

During 1982 Olin conducted an erosion control project at the Big D Site at a cost of approximately $780,000. Monitoring data collected during that project was sent to the OEPA. OEPA representatives were consulted prior to commencement of the project and visited the site during construction.

On December 30, 1982, the US EPA proposed the Fields Brook and Big D Sites for the National Priority List (hereinafter "NPL") under CERCLA. Olin opposed that proposal in a submission to the US EPA dated March 1, 1983. Two weeks later, in a letter dated March 16, 1983, Olin informed the US EPA of corrective actions taken at the

Big D Site. On March 29, 1983 Olin notified and certified to the US EPA and OEPA that it had implemented the approved closure plan for the TDI Plant Site.

The US EPA placed the Fields Brook and Big D Sites on the NPL as of September 8, 1983.

Groundwater sampling was conducted by Olin during 1984 as part of a hydrogeological study at the Big D Site. In a letter dated February 25, 1985 Mr. Richard S. Hendey, Olin's Manager of Regional Environmental Affairs, provided a chronology of hydrogeological investigation of the Big D Site and requested a joint meeting to discuss the status of the site prior to a decision by either the OEPA or US EPA on expenditure of funds for Remedial Investigations and Feasibility Studies (hereinafter "RI/FS") for the site.

On April 15, 1985 the US EPA notified Olin that it was a PRP for the Big D Site and requested that Olin provide specific information pertaining thereto and notify as to its willingness to conduct an RI/FS for the site. Two days later, representatives of Olin and OEPA met to address Olin's participation in the voluntary study and remediation of the site. The meeting participants agreed that the US EPA would prepare and submit to Olin a draft RI/FS workplan and would meet again to discuss any additional measures to be taken by Olin to fulfill the requirements of an RI/FS.

On July 15, 1985, pursuant to § 104(e) of CERCLA, Olin responded to the US EPA request for information on the Big D Site.

Between November of 1985 and the beginning of April, 1986 the US EPA and Olin engaged in negotiations regarding the technical details of the work to be performed for the

RI/FS. In response to an Olin letter memorializing the negotiations, EPA Region V Administrator Vladas Adamkus gave Olin until May 5, 1986 to sign a consent order agreeing to perform the RI/FS.

In an April 4, 1986 letter to Mr. Adamkus, Mr. Verrill M. Norwood, Vice President of Environmental Affairs at Olin, discussed the fact that the US EPA and Olin had been negotiating the terms of a consent order for Olin to perform the RI/FS, but noted that the EPA had withdrawn from negotiations in response to Olin's refusal to sign a draft consent order. In Mr. Adamkus' response on behalf of the US EPA, dated May 2, 1986, he rejected Olin's reasons for not signing a consent order and reaffirmed the May 5, 1986 deadline for signing. Approximately one and one half months after the expiration of that deadline, in a letter dated June 24, 1986, Olin reiterated its position that the RI/FS Scope of Work was overbroad and an unwise expenditure of funds, and again declined to sign the proposed consent order, although the desire for further negotiations was also communicated. Shortly thereafter, as promised, the US EPA hired a contractor to perform the RI/FS.

On June 23, 1986 Olin responded to a US EPA request, made pursuant to § 104(e) of CERCLA, for information on Fields Brook and, in so doing, for the first time named GenCorp as a co-operator of the plant.

US EPA requests for information on Fields Brook addressed to GenCorp pertained solely to its PVC plant, not the TDI Plant, and GenCorp's responses thereto were submitted on June 19, July 31, and August 26, 1986.

On March 22, 1989 the US EPA issued a Unilateral Administrative Order (hereinafter "UAO") for the

implementation of remedial design and pre-design activities, as well as RI/FS activities, for the Fields Brook Site. In July the US EPA gave public notice of a plan for proposed clean-up of the Big D Site in a draft Record of Decision (hereinafter "ROD"), which provided a 30 day period for public comment thereon. A public meeting to discuss the findings was held on August 8, 1989. On August 25, 1989 Olin directed its written comments to the US EPA findings. The final version of the ROD for the Big D Site was entered on September 29, 1989.

Negotiations between representatives of the US EPA, the OEPA, and Olin were held on November 15, 1989, January 25, 1990 and April 18, 1990 for the remedial design and remedial action (hereinafter "RD/RA") work to be performed at the Big D Site, but the time period set forth by the US EPA as to resolution of the issues pertaining to implementation of the RD/RA work expired without the US EPA receiving from Olin what it believed to have been "a good faith offer," causing the US EPA to issue a UAO, dated March 27, 1990, for the implementation of RD/RA for the Big D Site. Only Olin and Mr. Andrew Dreslinski, the original property owner of the Big D Site, were named as PRPs in this administrative order.

On March 26, 1990 Olin formed a "Big D Site team."

In a letter dated January 18, 1991 the US EPA notified Olin of its disapproval of the RD/RA work plans submitted by Olin and its determination that Olin had not complied with the terms of the UAO of March 27, 1990.

On March 21, 1991 the US EPA approved a revised plan submitted by Olin for the RD/RA at Big D.

Olin inter-office memoranda from mid-1990 reveal that Olin's legal department was instructed to determine whether "[GenCorp] [had] any liability as a PRP for the Big D Site remediation costs because of the Olin-General Tire joint venture arrangement at Ashtabula that existed from mid-1960s through the early 1970s." It was not until receiving letters dated July 29, 1991, written by Olin legal counsel Kevin R. Condon to Mr. Bruce H. Brubaker, Environmental Counsel of GenCorp, and to Mr. William A. Simon, Jr., Assistant General Counsel of GenCorp, that GenCorp was notified of Olin's contention that GenCorp had liability for its "share of the proper allocation of response and remediation costs incurred and to be incurred" at the Big D and Fields Brook sites.

GenCorp's response, included in a letter written by Mr. Simon to Mr. Condon dated November 7, 1991, was that there had been no joint venture between Olin and GenCorp so that any claim that GenCorp was potentially liable along with Olin was baseless.

On November 11, 1991 Olin entered into an agreement with Andrew and Barbara Dreslinski for the purchase of their property upon which the Big D Site was located. The parties exchanged releases from any claims which may have arisen prior to the signing of such agreement.

During that same month Olin submitted a post closure permit application to the US EPA for the TDI Plant Site, in which Olin informed that ground water monitoring and post-closure care would be continued at the site.

On August 6, 1992 a Consent Decree was approved in this district court in *United States v. GenCorp, Inc., et al.*, Case No. 5:89CV1866. Olin and the other signatory defendants

agreed to (and did) reimburse the United States for response costs incurred by the United States at the Fields Brook Site, plus interest.[8] In complying with that order Olin has incurred costs for monitoring, assessing and evaluating the release or threat of release of hazardous substances, as well as conducting specified remedial design and remedial investigation and feasibility studies at the Fields Brook Site. Those actions taken pursuant to the Fields Brook Order are ongoing.

Olin's excavation at the Big D Site began on September 18, 1992 and, in February of 1993, incineration of excavated soils and drum contents at the Big D Site began, test burn results having been approved. During the excavation activities conducted as part of the remedial action at the Big D Site Olin determined that the US EPA had underestimated the volume projections of the 1989 ROD, considering that: (1) the size of the landfill was larger than had been estimated previously; (2) significantly more drums of vacuum pump oil were buried at the site; (3) no one had been aware that drums of TDI residue were buried at the site; (4) few of the drums could be removed intact; and (5) in several areas the landfill was deeper than originally determined in the RI/FS. In fact, by the time Olin's excavation of the Big D Site had been completed approximately twice as many tons of waste and three to four times as many drums had been excavated and incinerated than had been projected in the ROD. An additional 15,000 tons of waste was incinerated during demobilization.

GenCorp initiated this action seeking a declaratory judgment that it is not liable in contribution or otherwise for

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[8] The parties have stipulated that the Fields Brook Site includes not only the brook, but also the TDI Plant Site.

Olin's past and future response costs to remove and remediate hazardous wastes from the TDI Plant which were disposed of at, and transported to, off-site facilities. GenCorp alleged that it did not jointly operate or own the TDI Plant which generated the hazardous wastes, nor did it jointly arrange for the disposal of waste from the TDI Plant.

Olin counterclaimed seeking a declaratory judgment that GenCrop is liable for at least one-half of all costs incurred and to be incurred by Olin for "assessment, containment, response, removal, and remediation" at the sites at which the TDI Plant waste was released/disposed of, on the basis that GenCorp and Olin jointly owned and operated the TDI Plant or that GenCorp was a common member of an association, consortium or other commercial entity which generated and arranged for disposal of hazardous wastes at sites in and around the plant. Olin claims in excess of $65 million in response costs.

As the parties agreed to dismissal under Rule 41(a)(1) of the Federal Rules of Civil Procedure of GenCorp's complaint the action is proceeding solely on Olin's counterclaim.[9]

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[9] Olin's counterclaim sought recovery for response costs at another site, the Summit National Superfund Site, but that claim was dismissed without prejudice pursuant to Rule 41(a)(2) upon the oral motion of Olin at the outset of the Phase I proceedings. Olin's counterclaim also sought recovery for legal costs pertaining to five other sites: New Lyme Landfill, Brenkus Shop, Doherty's Landfill, Universal Trucking, and Reserve Environmental Services. While it was true that the Sixth Circuit permitted recovery of such costs at the time of filing, the United States Supreme Court renounced such recovery in *Key Tronic Corp v. United States*, 114 S.Ct. 1960 (1994). On February 13, 1995, Olin asked GenCorp to stipulate to a voluntary dismissal of these claims and, upon GenCorp's refusal

CERCLA was enacted by Congress to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." H.R. 1016, 96th Cong., 2nd Sess., pt. 1, at 22, reprinted in 1980 U.S.C.C.A.N. 6119, 6125. The underlying purpose of the Act was to achieve cost effective and environmentally sound clean-up of contaminated sites.

In order to recover in a CERCLA private cost recovery cause of action, a plaintiff must prove the following:

> (1) that the site in question is a "facility" as defined in 42 U.S.C. § 9601(9);
>
> (2) that there has been a "release" or threatened release of a hazardous substance at that facility;
>
> (3) that the defendant falls within the definition of "liable parties" found in 42 U.S.C. § 9607(a); and
>
> (4) that the "release" or threatened release caused the plaintiff to incur "necessary response costs" consistent with the National Contingency Plan, 40 C.F.R. § 300 et seq.

Struhar v. City of Cleveland, 7 F.Supp.2d 948, 951 (N.D.Ohio 1998).

In this case a major dispute between the parties focuses on the definition of "liable parties."

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to do so, moved for dismissal pursuant to Rule 41(a)(2) or to amend its counterclaim to delete these sites.

Before addressing that issue this Court must consider GenCorp's argument that Olin's CERCLA § 113(f) action is time-barred as having been filed beyond the limitations period provided in § 113(g).

The statute of limitations to be applied in actions brought pursuant to CERCLA are found within § 113(g), which provides in pertinent part that cost recovery actions under § 107 of CERCLA, 42 U.S.C. § 9607, are subject to a six-year statute of limitations for remedial actions and a three-year statute of limitations for removal actions, as specified in 42 U.S.C. § 9613(g)(2), whereas contribution actions under § 113, 42 U.S.C. § 9613(f)(1) must be initiated within 3 years of the date of either a judgment for recovery of costs or damages or "the date of an administrative order...or entry of a judicially approved settlement with respect to such costs or damages," as specified in 42 U.S.C. § 9613(g)(3).

Pursuant to the holding of the Sixth Circuit Court of Appeals in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), this Court granted GenCorp's motion for partial summary judgment on Count II of Olin's counterclaim and held that as a PRP Olin could not bring a separate claim for joint and several cost recovery but is limited to an action for contribution governed by the mechanisms set forth in CERCLA § 113(f). Sections 107(a) and 113(f) are intertwined, in that a § 113(f) contribution action "*is* an action to recover the necessary costs of response by any other person, as referred to in § 107." *Ibid.* Thus, while liability is defined by § 107, including what parties are liable and what defenses may be employed, this contribution action is controlled by equitable apportionment principles set forth in § 113(f). *Ibid.*

As regards the applicable statue of limitations, in *Centerior* the Sixth Circuit noted that although there was no question before that court as to the statute of limitations to be applied to contribution claims where a party incurs response costs pursuant to a § 106 administrative order, it would nonetheless be inclined to follow the holding of the 10th Circuit in *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192 (10th Cir. 1997), *cert. denied*, 118 S.Ct. 1045 (1998), that the plaintiff PRPs, whose cause of action was one for contribution under § 113(f), had to have initiated their case within the limitations period of § 113(g) which provides that "[a]n initial action for recovery of the costs referred to in section 9607 of this title must be commenced...for remedial action, within 6 years after initiation of physical on-site construction of the remedial action...." The case pending before that court was deemed as "the 'initial action' for recovery of such costs." *Ibid.*

GenCorp argues that in light of the fact that Olin's contribution action constituted the "initial action" for recovery of response costs referred to in § 107 it is barred as untimely under § 113(g) because it was filed more than six years after Olin initiated physical on-site activities at the TDI Plant and Big D Sites.

Olin counters that any assertion of time-bar pertaining to the § 113 contribution claim has been waived by Olin in light of GenCorp's counsel's representation at the Phase II trial that, "Our position is not that Olin has blown the statute of limitations for contribution under the statute for contribution. Our theory was statute of limitations on the 107 claim for cost recovery and also our thereby is...the laches argument...." (Transcript, p.1190.)

Waiver aside, Olin argues that the limitations period had not expired at the point of initiating its claims against GenCorp for each of the following reasons: (1) Olin does not seek recovery for work done in the early 1980s, as that work was not undertaken in compliance with the NCP[10]; (2) the work performed by Olin at Big D and the TDI Plant in the early 1980s was "removal," and not "remedial," work, so that the statute did not begin to run upon completion of that work; (3) "remedial" work under CERCLA is work undertaken pursuant to a "permanent site remedy," which type of work was not begun by Olin until the 1990s in response to the 1989 determination by the US EPA that the removal work performed by Olin in 1982 at the Big D Site had not remedied the contamination therein and that the work had to be dismantled; and (4) even if that work had been considered remedial in nature, the subsequent work performed in the 1990s was sufficiently removed in time to have separated it from work performed in the 1980s and, therefore, began a new limitations period.

In this Court's opinion, it is pivotal to the issue of waiver of the limitations defense that GenCorp had previously challenged the timeliness of Olin's causes of action. That challenge placed Olin on notice that timeliness was in issue, so that at this stage in the proceedings Olin would not be prejudiced by a limitations defense. In light of that fact, as well as the fact that the *Centerior* opinion (and the *Sun Company* decision upon which the court relied) were decided after the Phase II trial, but prior to the instant opinion, this Court does not deem the statute of limitations defense to have been waived.

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[10] That was conceded by GenCorp's counsel at the Phase II trial (Transcript, p. 1935).

That having been said, the defense is unpersuasive for each of the following reasons.

First, while this Court could have been persuaded that an action to recover costs incurred in the early 1980's was time-barred, Olin is not pursuing recovery for those expenditures and the work performed in the early 1980's was separate from that undertaken in the 1990's.

In the early 1980's Olin deposited topsoil onto eroded portions of the Big D landfill, then deposited clay on top of the landfill, stabilized a slope and took actions to prevent water from migrating offsite. GenCorp has stipulated that such work was preformed in order to prevent soil erosion. At the TDI Plant Site Olin removed hazardous wastes, including contaminated soil and sludges, and contaminated sediments from Fields Brook.

The NCP defines removal actions to include:

> (2) Drainage controls, for example, run-off or run-on diversion — where needed to reduce migration of hazardous substances or pollutants or contaminants off-site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;
>
> (3) Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons — where needed to maintain the integrity of the structures;
>
> (4) Capping of contaminated soils or sludges — where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

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> (6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas — where such actions will reduce the spread of, or direct contact with, the contamination....

40 C.F.R. § 300.415(d).

Clearly, the aforementioned work performed in the early 1980's falls within the parameters of removal actions. The fact that the work was performed within a relatively short time after a clean-up was initiated and was relatively low in cost at both sites is also indicative of a removal, as opposed to remedial,[11] action. *See*, *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 291 (6th Cir. 1991); *BCW Assocs., Ltd. v. Occidental Chemical Corp.*, 1988 U.S. Dist. LEXIS 11275, at *51 (E.D.Pa. 1988). A permanent remedy is initiated after issuance of an RI/FS, as proposed remedies set forth therein must be selected and approved before being implemented. H.R. Rep. No. 99-253 Part 3, 99th Cong., 1st Sess. 21 (1985); *Kelley v. E.I.DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994). In this case in March of 1989 the US EPA issued its UAO for the implementation of remedial design and pre-design activities, as well as RI/FS activities, for the Fields Brook Site. Approximately one year later, on March 27, 1990, the EPA issued its UAO for the implementation of RD/RA for the Big D Site. It would follow

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[11] CERCLA defines "remedial action" as "consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment...." 42 U.S.C. § 9601(24).

that any permanent remedy would have been implemented subsequent thereto.

That conclusion is further augmented by the fact that in the 1989 ROD for the Big D Site the EPA determined that earlier work performed by Olin at that site failed to remedy the problems there and the work had to be dismantled. In that vein, the 1990 UAO ordered Olin to tear off the clay cap that had been deposited over the landfill and to take the measures set forth in the ROD. The resulting work, which began in 1991 (almost a decade after the initial work), included removal of the clay cap, excavation of the site, and removal and incineration of wastes and contaminated soils from the landfill and south slope. Thus, the prior work was not "permanent" as would be required for a remedial action, nor was it consistent with the remedy mandated by the EPA in the 1990 UAO.

Based upon the foregoing this Court finds Olin's claims for relief to be timely filed.

Having addressed the issue of timeliness this Court now turns to questions pertaining to liability.

Olin urges this Court to find GenCorp to be a "person" within the meaning of sections 107(a)(2) and (3) of CERCLA, 42 U.S.C. §§ 9607(a)(2) and (3), and thus liable for clean-up costs at the Big D and Fields Brook (which includes the TDI Plant) Sites.[12]

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[12] Sections 107(a)(2) and (3) impose liability for costs and damages upon:

(2) any person who at the time of disposal of any hazardous

As regards the Big D Site, Olin argues that GenCorp became a liable "person," as contemplated under CERCLA, by reason of having formed a "joint venture," an "association" or a "commercial entity," which arranged for the disposal of TDI residue wastes at the Big D Site. As an alternative position, Olin claims that GenCorp, on its own, arranged for the disposal of TDI residue at Big D.

With regard to the Fields Brook Site, Olin asserts that GenCorp is a liable person, again by reason of its "joint venture" or "association" with Olin, as an owner or operator of the site who disposed of hazardous waste at the Fields Brook Site, or, in the alternative, solely as an equitable owner or operator of the TDI Plant which manufactured the hazardous substances disposed of at the Fields Brook Site.

The parties have expended a great deal of effort grappling with the issue of whether there was a joint venture or association between Olin and GenCorp which served to

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substance owned or operated any facility at which such hazardous substances were disposed of.

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances....

confirm status upon GenCorp as a "person" under CERCLA.[13]

The section defining "person" has been broadly interpreted by the Sixth Circuit Court of Appeals to include "all known forms of business and commercial enterprises." *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991). Although liability under CERCLA is a federal question, state law is applied to determine whether a particular business relationship existed and whether it, in turn, was a CERCLA "person." *Ibid.*

Under Ohio law, a joint venture requires the following five elements: (1) an agreement to engage in a business undertaking, whether express or implied; (2) an intent by the parties to associate themselves as joint adventurers, which can be assessed by application of ordinary rules of contract interpretation; (3) a community of interest in the endeavor; (4) equal authority or right to direct the movements and conduct of each other; and (5) sharing of profits and losses. *Silver Oil Co. v. Limbach*, 44 Ohio St.3d 120, 541 N.E.2d 612, 615 (1989); *Ford v. McCue*, 163 Ohio St. 498, 127 N.E.2d 209, 212-13 (1955). It has also be held that "each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers...." *Matter of Sluss*, 56 B.R. 575, 579 (Bankr.S.D.Ohio 1986). The parties must also have the right of joint proprietorship to the extent that each joint adventurer has control of the means used to carry out the goal of the endeavor. 13 *Ohio Jurisprudence 3d*,

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[13] The term "person" is defined in part in § 101(21), 42 U.S.C. § 9601(21), as "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity...."

Business Relationships, Sections 1094-98 (1979 and 1987 Supp.)

In the present case, Olin argues that by the terms of the 1962 Agreement the parties entered into a joint venture as defined under Ohio law. As interpreted by Olin that agreement created a joint venture by virtue of providing: for the parties to pool their resources and share profits and losses; for GenCorp to provide laborers and "many of the managers" to operate the plant; for the parties to share in the costs of constructing the plant, as well as the fixed and variable costs of operating the plant, and to share the TDI they produced as well as the profits from the sales of the by-product from making TDI; for Olin to provide management personnel and expertise in manufacturing TDI; and for the parties to participate equally in plant operations by reason of the TDI Committee.

On the other hand, GenCorp asserts that while the 1961 Agreement between the parties contemplated the parties jointly owning and operating the TDI Plant, that agreement was nullified and replaced by the 1962 Agreement which altered their relationship in several key particulars and, in so doing, negated any joint venture status.[14]

This Court finds that while there were some elements of a joint venture under the terms of the 1962 Agreement there was no joint venture created by that agreement. Overall, the 1962 Agreement, especially when read in conjunction with the

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[14] The testimony of Mr. James Wetzel at the Phase I trial was that Olin precipitated the change due to "antitrust worries on Olin's part." (Tr. 3464-65)

1961 Agreement and its draft revisions, fails to evidence an intent to form a joint venture.

A comparison of pertinent language in the 1961 and 1962 Agreements, set forth previously herein, reflects that the responsibilities of the TDI Committee changed from having been granted "responsibility" over the TDI Plant to "over[sight of] the construction, operation and management of the plant." In fact, in a draft of the 1962 Agreement submitted as evidence at trial the TDI Committee had been empowered to "supervise and control" operations of the plant, but the final version opted to have the Committee "overseeing" the operation of the plant.

In a significant change involving the process for selecting a Plant Manager the TDI Committee would no longer make that selection. Instead, Olin would make its decision independently after merely "consulting with" the Committee. While chairmanship of the TDI Committee had rotated between Olin and GenCorp under the 1961 Agreement there was no such parallel provision under the 1962 agreement. Instead, the new agreement called for Olin to appoint a "Committee Manager" who, with instructions from the Committee, was the only person authorized by the Committee to direct the Plant Manager. The Plant Manager was also to be selected by Olin as was the supervisory staff over the day-to-day operation of the plant. Other full-time plant personnel were to be supplied by both Olin and GenCorp, with those employees to remain on the payroll of, and to receive normal employee benefits from, their respective employer.

Another major change from the 1961 to the 1962 Agreements which provides evidence of the parties' intent was the provision stating that the TDI Plant would not be jointly owned and operated but would be owned and operated

solely by Olin until the time of title transfer as provided in the agreement. The new agreement also required Olin to construct the plant at its sole cost and expense,[15] and provided that Olin was responsible for obtaining insurance coverage for the TDI Plant for all liability and property damage.

Further evidence that the parties did not intend to form a joint venture can be found in the requirement that GenCorp purchase fifty percent of the TDI Plant output, which Olin would sell at its cost, while at the same time Olin had the right to sell the remaining fifty percent to other purchasers at a cost within its discretion, without any obligation to share the profits from such sales with GenCorp. GenCorp was also required to purchase from Olin any hydrochloric acid by-product from the TDI Plant which could be used in GenCorp's PVC plant.[16]

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[15] In effect Olin did so, considering that the monies paid by GenCorp as "earnest money" towards the purchase of the plant were returned to GenCorp.

[16] These factors also impact on the absence of sharing of profits between the parties. Olin's profit was to come from the sale of TDI to GenCorp and others, whereas GenCorp's profits were to come from use of TDI in its manufacturing of PVC products. The Ohio Supreme Court in *Ford v. McCue, supra* at 503, specifically held that in determining whether a joint venture existed the profits from the endeavor must be "joint and not several." In a similar vein, although the cost-reducing measures of the 1965 Agreement were aimed at increasing profits to Olin from its sale of TDI and to GenCorp from the lower cost of TDI which would be incorporated into the manufacture of PVC products, once again those profits would be several and not joint.

In sum, the fact that there was not complete community of interest in the endeavor, that the parties did not have equal authority or right to direct the movements and conduct of each other, that there was no right of joint proprietorship to the extent that each joint adventurer had control of the means used to carry out the goal of the endeavor and, finally, that there was no sharing of profits, lead this Court to conclude that the parties did not intend to enter into a joint venture.

The case relied upon by Olin as controlling on this issue of the existence of a joint venture, *Bulgrin v. Madison Gas & Electric Co.*, 125 Wis.2d 405, 373 N.W.2d 47 (Wisc.Ct.App. 1985), *review denied*, 378 N.W.2d 291 (Wisc. 1985), does not convince this Court otherwise.

That case is distinguishable for a number of reasons, not the least of which is that it was the parties to the joint venture agreement who were asserting the existence of a joint venture in a case initiated by an injured utility company employee who collected worker's compensation benefits from his employer, that being his exclusive remedy against the company, but who also sought to recover against two other companies which, along with his employer, jointly owned, operated and maintained the Columbia Energy Center, the location of his injuries. 373 N.W.2d at 49-50. According to the plaintiff the other two companies were negligent in selecting his employer company to supervise and operate the facility. *Ibid.* The two other companies argued that as joint venturers in the facility at which the injuries occurred they were also the plaintiff's employers and, therefore, having previously collected worker's compensation, the plaintiff had no remedy against them. *Ibid.*

The Wisconsin appellate court reversed the lower court's dismissal of plaintiff's case against the other two companies,

and held that the affidavits and documentary evidence demonstrated at least a prima facie showing of the existence of a joint venture, with the other two companies surrendering the right to control the facility to the company which employed plaintiff, and that a genuine issue of material fact existed as to whether the employee could be deemed an employee of the other two companies. *Id.* at 50.

Other critical distinctions between *Bulgrin* and the present case are that in *Bulgrin*, in addition to the parties admitting their intent to form a joint venture (which they supported with documentary evidence), the joint venture agreements specifically addressed each joint venturer's "ownership share." *Ibid.* Also, each joint venturer contractually agreed that the company operating their facility was an independent contractor in its operation. *Ibid.* Of particular significance was the fact that the joint venturers in *Bulgrin* contractually agreed to share all costs of operation and all liability in proportion to their percentage of ownership in the facility. *Ibid.*

In contrast, in this case GenCorp denies the existence of a joint venture. Additionally, Olin and GenCorp contractually agreed that Olin would construct, own and operate the TDI Plant, which it would sell to GenCorp five years later, but that prior to that time Olin would instruct GenCorp in its process for manufacturing TDI, would sell TDI to GenCorp, and would be responsible for taxes and other liabilities relating to the TDI Plant, as well as for obtaining any licenses or permits relating to the TDI Plant.[17]

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[17] Similar rationale applies to distinguish another case relied upon by Olin, *Hudson v. A.C. & S. Co.*, 535 A.2d 1361 (Del.Super.Ct. 1987). That case also involves an injured employee

The fact that the State of Ohio, the federal government and other third parties did not interact with the TDI Plant as a separate entity is further support for this Court's conclusion that there was no joint venture between Olin and GenCorp. Federal and state pollution control authorities granted permits to Olin, not any other entity, and subsequently looked to Olin to remedy environmental problems deriving from the TDI Plant. No evidence has been submitted regarding third party contracts with the TDI Plant as a separate entity.

Based upon all the foregoing, this Court is of the opinion that Olin and GenCorp did not jointly own the TDI Plant.

As an alternative position, Olin argues that the two companies formed an "association" or some other "commercial entity" constituting a "person" subject to liability under CERCLA.

During the Phase I and Phase II trials, this Court has openly expressed the opinion that while the parties were not engaged in a joint venture, they were engaged in an "association," "consortium," or "commercial entity," as contemplated under the definition of "person" found in

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who collected worker's compensation benefits from his employer, but then initiated claims against his employer's joint venturers. The joint venturers offered proof of the existence of their joint venture in an attempt to extend the worker's compensation bar to themselves, including the fact that they explicitly labeled their relationship as such in the Joint Venture Agreement, provided that the product produced by the joint venture was equally owned by the venturers, agreed that each joint venturer would bear responsibility for liability to others, and agreed to equally bear responsibility for costs and expenses of the venture.

CERCLA § 101(21). For the following reasons, that opinion has not been swayed.

The parties have not cited, nor has this Court's extensive research uncovered, any cases directly addressing whether an arrangement like that created by the 1962 Agreement can constitute a "person" subject to CERCLA liability. However, the Sixth Circuit Court of Appeals has offered insight on these issues, albeit in the context of CERCLA liability of successor corporations as "persons," in *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991):

> Section 9607(a)(2) imposes liability on any "person" who owned or operated the facility at the time the contamination occurred. "Person" is specifically defined in § 9601(21) to mean, among other things, "corporation" and "association." *CERCLA does not define either "corporation" or "association," and to this extent is incomplete.* Nevertheless, the United States Code contains rules of construction that apply to all federal statutes unless the context indicates otherwise...It seems clear that the listing of the various terms applied to business entities within the meaning of "person" in § 9601(21) — "firm, corporation, association, partnership, consortium, joint venture, commercial entity..." — *was intended to include all known forms of business and commercial enterprises*.....Though CERCLA's legislative history is scant, its two essential purposes have been identified. First, Congress intended to provide the federal government with the tools immediately necessary for a swift and effective response to hazardous waste sites....Second, Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the

> harmful conditions they created....The creation of a private right of action against responsible parties reflects this second purpose....Having identified the essential purposes of the Act, the First and Second Circuits have joined in proclaiming that "[w]e will not interpret § 9607(a) in any way that apparently frustrates the statute's goals, in the absence of specific congressional intent otherwise." ...*Moreover, the remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes.*

(Citations omitted) (Emphasis added.)

The term "association," as defined under Ohio law, has been referred to as "a catch-all term indicating a collection of persons who have joined together in order to accomplish a common goal or enterprise." 6 *Ohio Jurisprudence 3d*, Associations and Corporations Not For Profit § 1 (1996). "In its legal sense, the term refers to a body of persons united without a charter, but under the methods and forms used by incorporated bodies, for the prosecution of some enterprise." *Ibid.* Ohio treats unincorporated associations as legal entities, capable of suing and being sued. *Tanner v. Columbus Lodge No. 11, Loyal Order of Moose*, 44 Ohio St.2d 49, 52, 337 N.E.2d 625 (1975). *Accord, Rine v. Sabo*, 113 OhioApp.3d 109, 680 N.E.2d 647 (Lucas County 1996).

While "commercial entity" is also included within the definition of "person" found in § 9601(21), that label is also undefined. "Commercial" is commonly accepted to mean any activity evoking commerce and business. *Black's Law Dictionary*, p. 270 (6th Ed. 1990). An "entity" is generally accepted as including an enterprise or being with a separate existence. *Id.* at 532. Beyond those definitions, this Court is

guided by the Sixth Circuit's reasoning in *Anspec* that "the listing of various terms applied to business entities within the meaning of 'person' in § 9601(21) [including 'commercial entity']...was intended to include all known forms of business and commercial enterprises."

Applying the foregoing to the facts of this case, this Court remains of the opinion that Olin and GenCorp joined together to accomplish a common goal or enterprise, i.e., the creation of a TDI Plant for the production of TDI to be sold by Olin and purchased by GenCorp for use in its manufacturing of PVC products. That endeavor was meant to be an activity evoking commerce or business and was separate from Olin and GenCorp's other business enterprises.

In light of the fact that GenCorp does not deny that if such a relationship exists it could be held liable as an operator of the TDI Plant under CERCLA, but instead hinges its entire argument on the assertion that there was no such relationship between GenCorp and Olin, this Court's determination that GenCorp and Olin were engaged in an association or commercial entity, being the TDI Plant, would also be determinative as to liability.

This Court is not persuaded otherwise by GenCorp's argument that the enterprise created by Olin and GenCorp cannot fall within the definition of a CERCLA "person," imposing liability on GenCorp, in light of the decision of the United States Supreme Court in *United States v. Bestfoods*, __U.S.__, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998).

GenCorp argues that in light of the *Bestfoods* ruling it cannot be held derivatively liable under CERCLA for pollution at the TDI Plant. For each of the following reasons, this Court disagrees.

The *Bestfoods* case addressed the question of the framework for holding a parent corporation responsible as an "operator" under CERCLA either derivatively for the environmental errors of its subsidiary or directly for its own actions. The Supreme Court held that in the absence of any specific language in CERCLA establishing the liability of a parent corporation as an operator of a polluting facility owned or operated by its subsidiary the parent corporation could only be held derivatively liable, provided that common law principles of corporate law were applied to pierce the corporate veil. 141 L.Ed.2d at 57. The Court further held that a parent corporation may be subject to direct liability in its own right under CERCLA, as an operator, if the parent actively participated in, and exercised control over, the operations of the polluting facility. *Id.* at 58-62.

This Court finds *Bestfoods* to be distinguishable from the present case to the extent that GenCorp relies on it in arguing that it cannot be held derivatively liable because the TDI Plant was not an entity recognized by common law, i.e., it was not a "joint venture," "association," or a "commercial entity." *Bestfoods* was premised entirely upon issues of CERCLA liability in the context of a parent-subsidiary relationship, which was not one of the business relationships enumerated in the definition of "person" under CERCLA, whereas in the present case this Court has determined that the relationship between Olin and GenCorp did fall within that definition and CERCLA is not silent as to liability for associations and commercial entities. Consequently, the *Bestfoods* holdings pertaining to derivative liability of a parent corporation are inapplicable in determining GenCorp's liability as a member of an association or commercial entity.

Having found that by reason of its relationship with Olin, GenCorp is a liable "person" as defined in CERCLA

§ 101(21), this Court will nonetheless address the arguments of the parties as to whether at the time of disposal GenCorp owned or operated any facility at which hazardous substances were disposed of or whether GenCorp arranged for such disposal or treatment. Olin argues the GenCorp is directly liable as an "owner" or "operator" for the Fields Brook site or as an "arranger" for the Big D Site.

The definition of "operator" status, having been inadequately defined under CERCLA as "any person...operating [a covered] facility," 42 U.S.C. § 9601(20)(A)(ii), was clarified by the Supreme Court in *Bestfoods* as follows:

> [A]n operator is simply one who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, **an operator must manage, direct, or conduct operations specifically related to pollution**, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

United States v. Bestfoods, supra at 59. (Emphasis added.)

Olin has offered the following evidence as indicia of GenCorp's status as an "operator":

(1) Disposal of TDI residue was an issue discussed at the TDI Committee and [GenCorp]'s Committee members were requested by the Committee to research and recommend waste disposal locations for the residue ([Vernon] Hartmann at 2109-13; [Richard] Hiendlmayer at 2221).

(2) [GenCorp] The TDI Plant hourly workers actually dumped TDI residue on the ground at the TDI Plant site, thus causing a release within the meaning of CERCLA within Fields Brook ([George] Palmer at 758; [Ron] Bimle at 388-93).

(3) [Robert] Laundrie, a [GenCorp] Vice President, inspected the Big D Landfill in April 1965, where TDI residue was then being disposed (Laundrie at 4166, 4168-69). What he saw regarding the manner of disposal of the waste disturbed him enough to write to [George] Palmer, the TDI Plant Manager, admonishing him and noting a series of inadequacies connected with the disposal (Exh. 147, Vol. 1, Palmer). [George] Palmer "jumped through the hoop" on receiving this letter (Palmer at 807). His immediate reaction was to "[g]et on the ball and do something...[because] Mr. Laundrie was on the TDI Committee and therefore represented [GenCorp] as a 50% partner...." (*id.* at 806) [Robert] Laundrie maintained his interest in the disposal of residue at Big D. [Richard]Papenfuss testified that [Robert] Laundrie, in a number of conversations, "indicated that he expected [Richard Papenfuss] to continue to try to upgrade [Big D] to eliminate what he considered sloppy practices...." (Papenfuss at 2546-47). [Richard] Papenfuss followed his instructions (*id.* at 2550). [Robert] Laundrie inspected the landfill again in 1971 and prepared a memorandum expressing his continuing concerns (Laundrie at 4174; Exh. 326, Vol. 2, Glenn).

(4) [GenCorp] representatives also helped to approve methods to reduce the hazardous residue being sent off site. This included approval of a CAR for "residue disposal" (Exh. 377-a, Part II, "Operations" and Part IX CARs, Vol. 9, "Monthly Reports"; Palmer at 781-84), and a CAR for

construction of pollution abatement facilities at the site (Exh. 381, Vol. 1 Palmer; Exh. 385, Vol. 2, Glenn).

(5) From the early 1960s into the early 1970s, [GenCorp], with Olin, jointly funded "Golden TDI" research into ways to find a commercial use for TDI residue, with the purpose of reducing the quantity that needed to be shipped off site for disposal ([Robert] Belner at 1220-21, 1236; [Richard] Hiendlmayer at 2228-29; Babiec at 1273-74, 1285-86). Dr. Robert Belner of [GenCorp] said to a [GenCorp] TDI Committee member that it was important for [GenCorp] to participate in the Golden TDI program because unless it was successful, "we [GenCorp]...will have the liability of having to dispose of several million pounds of [TDI] by-product tar." (Exh. 77, Vol. 1, Belner).

(6) [GenCorp] hourly workers removed the TDI residue from the Plant process, put it in drums for transport to Big D, and loaded the drums onto trucks to be transported there (Bimle at 385-87; [Allen] Glavan at 1350-51). These hourly workers were supervised by shift supervisors who were on [GenCorp]'s payroll (Bimle at 378, 85).

(7) Spent vacuum oil, a hazardous substance under CERCLA was spilled by [GenCorp] hourly workers on the land at the TDI Plant site (Bimle at 396-97).

(8) A [GenCorp] employee ([Neil] Hainline) admitted that he was in charge of day-to-day operations at the TDI Plant and his responsibilities included removal of TDI residue waste (Hainline at 1493).

(9) A [GenCorp] engineer working at the TDI Plant signed and approved documents, including service order,

regarding transfer of the residue off-site to Big D ([Allen] Glavin at 1359-60; Goughin at 2843-45).

(10) Ortho-TDA, a listed hazardous substance that was a by-product of the TDI manufacturing process, was taken by [GenCorp] hourly workers to [GenCorp]'s adjacent PVC Plant and disposed of by incineration in one of the boilers there (Bimle at 394-95; Papenfuss at 2528-30).

(11) [GenCorp] was also involved in other pollution-related matters at the TDI Plant. For example, Laundrie instructed the TDI Plant managers to refer environmental complaints, license and/or permit applications to [GenCorp]'s Central Engineering department in Akron (Exh. 251, Vol. 2, Glenn (Direct)). Also, in Mr. Laundrie's absence, Mr. Glenn of [GenCorp] wrote to the TDI Plant Manager, directing the TDI Plant to complete a permit application for the Corps of Engineers and to submit that application to [GenCorp] in Akron for approval by one of three specified officers (Exh. 388, Vol. 2, Glenn (Direct); Cupach at 3046).

(12) Sam Salem, a [GenCorp] Vice President, signed a U.S. EPA Hazardous Waste Permit Application for the TDI Plant (Salem at 261-63).

This Court is satisfied that the foregoing evidence establishes that GenCorp actively managed, directed, or conducted operations specifically related to pollution and, therefore, was an "operator" of a polluting facility. An operator is directly liable under CERCLA "regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who

sneaks into the facility at night to discharge its poisons out of malice." *Bestfoods*, *supra* at 58.[18]

Olin also agues that GenCorp is liable as an "owner" at Fields Brook as a consequence of its ownership of the property upon which the TDI Plant was built and of its purported "equitable ownership" of the TDI Plant itself.

It is undisputed that GenCorp owned the property upon which the TDI Plant was built and, therefore, is subject to liability on that basis.

The parties disagree as to whether GenCorp can be deemed an "equitable owner" of the TDI Plant itself, with Olin asserting such ownership under Ohio law consequent to GenCorp having paid earnest money towards the purchase of the TDI Plant as contemplated by the 1962 Agreement.

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[18] Finding operator status for purposes of CERCLA liability is not necessarily inconsistent with the fact that the 1962 Agreement designated that Olin would be owner and operator of the TDI Plant, as the above-referenced standard for determining operator status in order to determine CERCLA liability requires only management, direction or conducting operations pertaining to release of hazardous substances or compliance with environmental regulations. In contrast, owning and operating the TDI Plant, as contemplated by the 1962 Agreement, was much broader in scope.

For similar reasons there is no inconsistency with the holding that there was no joint venture between the parties herein and the determination that GenCorp was an "operator," due to the different standards to be applied in reaching those conclusions. Operator status does not require any of the five elements of a joint venture set forth previously herein.

In support of the foregoing argument Olin offers several cases decided under the law of Ohio, each of which involve vendees in possession of property who were found to have been equitable owners of that property. *Flint v. Holbrook*, 80 OhioApp.3d 21, 608 N.E.2d 809, 814 (Montgomery County 1992); *Butcher v. Kagey Lumber Co.*, 164 Ohio St. 85, 128 N.E. 54, 56 (Ohio 1955); *Coggshall v. Marine Bank Co.*, 57 N.E. 1086 (Ohio 1900); *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N.E. 863 (1891). In determining status as an "equitable owner" one party is typically a nominal owner of the property in question and the other is the beneficial or equitable owner. *Flint v. Holbrook*, *supra* at 814. Certainly Olin could not be considered a nominal owner of the TDI Plant and GenCorp was not a vendee in possession empowered to use the TDI Plant without interference from Olin. *Ibid.* (Equitable owners have "the right to use the property free from interference of the vendor....").

Based upon the foregoing this Court cannot find that GenCorp was an "equitable owner" of the TDI Plant itself.

As regards the Big D Site, Olin argues that GenCorp is liable as an "arranger" for disposal of hazardous substances, a proposition which GenCorp disputes.

Under CERCLA, 42 U.S.C. § 9607(a)(3), "arranger" liability is imposed upon:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment,...of hazardous substances owned or possessed by such person, by any other party or entity, at any facility...owned or operated by another party or entity and containing such hazardous substances....

Specifically, Olin asserts: (1) that GenCorp can be deemed vicariously liable for employee activities which amounted to arrangements for disposal at Big D; (2) that GenCorp arranged for disposal of hazardous substances by entering into certain agreements with Olin; and (3) that GenCorp "otherwise arranged" for disposal of hazardous wastes by arranging for the production of TDI for use at a plant with which GenCorp was intimately involved.

The phrase "arranged for" is not defined in CERCLA, but the Sixth Circuit Court of Appeals has interpreted it to mean that a person must have actual intent to dispose of a hazardous substance in order to be an "arranger." *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996); *Struhar v. City of Cleveland*, 7 F.Supp.2d 948, 951-52 (N.D.Ohio 1998). There must be a sufficient nexus between GenCorp and the hazardous substances in order to hold GenCorp liable as an arranger. *Pierson Sand & Gravel, Inc. v. Pierson Township*, 851 F.Supp. 850, 855 (W.D.Mich. 1994), *affirmed*, 1996 U.S.App. LEXIS 16088 (6th Cir. 1996), citing *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2nd Cir. 1992) and *CPC International, Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269, 1278-79 (W.D.Mich. 1991). Active involvement in decisions as to timing, manner or location of disposal is unnecessary and a defendant need not be aware that the hazardous substances would be deposited at a certain site, nor believe that they would be deposited elsewhere. *Ibid.* Liability cannot be avoided by one who has used or generated hazardous substances by "contracting away its responsibility and then closing its eye to the method of disposal." *Ibid.*

In determining whether a party "otherwise arranged for" the disposal of hazardous substances that party's actual intent may either derive from direct evidence or by way of inference

based upon the totality of the circumstances. In so holding in *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840 (6th Cir. 1999), the Sixth Circuit quoted with approval the following language from *United States v. Cello-Foil*:

> 'Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.' Whether a party possesses the requisite intent is a question of fact.

Supra, at 1233. (quoting *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)). Clearly, the element of actual intent would also apply to a party alleged to be an arranger by reason of contract or agreement.

GenCorp argues that it cannot be held liable as an arranger by reason of the acts of its employees who worked at the TDI Plant but remained on GenCorp's payroll, because they were mere low-level "line employees" who did not make the ultimate decision as to off-site disposal of hazardous substances and that, at most, they were "loaned servants" whose actions were taken on behalf of Olin, not GenCorp.

The latter proposition is in contravention of this Court's opinion that Olin and GenCorp were engaged in an association or commercial enterprise, being the TDI Plant, for their mutual benefit. In addition, it would be insufficient to only consider the activities of those low-level employees as reflecting GenCorp's intent to dispose of hazardous substances, considering the totality of the evidence with regard to GenCorp's status as an operator of the TDI Plant including: (1) the fact that disposal of TDI residue was an

issue discussed at the TDI Committee and GenCorp's Committee members were requested by the Committee to research and recommend waste disposal locations for the residue; (2) in April 1965, Robert Laundrie, a GenCorp Vice President, inspected the Big D Landfill where TDI residue was then being disposed of and thereafter admonished Mr. George Palmer, TDI Plant Manager, for a series of inadequacies connected with the disposal; (3) that Mr. Laundrie also instructed Mr. Richard Papenfuss to "to continue to try to upgrade [Big D] to eliminate what he considered sloppy practices....;" (4) that Mr. Laundrie inspected the landfill again in 1971 and prepared a memorandum expressing his continuing concerns; (5) that GenCorp representatives also approved methods to reduce the hazardous residue being sent off site by approving a CAR for "residue disposal," as well as a CAR for construction of pollution abatement facilities at the site; (6) that between the early 1960s and early 1970s, GenCorp and Olin, jointly funded "Golden TDI" research into ways to find a commercial use for TDI residue, with the purpose of reducing the quantity that needed to be shipped off-site for disposal; (7) that Dr. Robert Belner of GenCorp said to a TDI Committee member that it was important for GenCorp to participate in the Golden TDI program because unless it was successful, "we [GenCorp]...will have the liability of having to dispose of several million pounds of [TDI] by-product tar;" (8) that GenCorp hourly workers (supervised by shift supervisors who were on GenCorp's payroll) removed TDI residue from the plant process, put it in drums for transport to Big D, and loaded the drums onto trucks to be transported there; and (9) that a GenCorp engineer working at the TDI Plant signed and approved documents, including service orders, regarding transfer of the residue off-site to Big D.

As regards the period after October 1, 1973, the date upon which the 1971 Agreement specified that the 1962 Agreement would be terminated, this Court believes that GenCorp may be considered to be a party who "otherwise arranged" for the disposal of hazardous wastes from the TDI Plant, by reason of its continued relationship with the plant as evidenced by the following: (1) even after that date GenCorp continued to be the plant's largest customer; (2) GenCorp continued to provide steam to the TDI Plant for use in its manufacturing process; (3) GenCorp continued to provide services (such as industrial relations, medical, payroll and purchasing services) at cost to the plant; (4) GenCorp derived benefit from sales of by-product, including muriatic acid and Ortho-TDA or Golden TDI sales; (5) GenCorp paid for costs of disposing of TDI residue as a variable cost; (6) GenCorp continued to lease the land upon which the TDI Plant stood for a nominal fee of $10.00 per year; (7) under the terms of the TPS Agreement, Olin guaranteed GenCorp the best available price for TDA, agreed to convert it into TDI at Olin's cost, agreed that if GenCorp found TDA at a lower cost Olin would charge it through the TDI Plant as though it came from Olin; and (8) TDI was manufactured using specifications contracted for by GenCorp. Such degree of involvement was clearly more than the usual customer.

It is this Court's opinion that the foregoing evidence is sufficient to establish that GenCorp "arranged for" disposal or treatment of hazardous substances, so as to warrant the imposition of liability under CERCLA, 42 U.S.C. § 9607(a)(3).

In summary, this Court finds GenCorp to be a "person" who is liable for disposal of hazardous substances at the Fields Brook and Big D Sites.

Olin's claims, however, are for contribution and subject to the allocation provisions of CERCLA § 113(f). Allocation of damages was the subject of the Phase II trial in this case.

Pursuant to CERCLA § 113(f), 42 U.S.C. § 9613(f), contribution may be sought by any party held liable under § 107(a). The term "contribution," as it is used in CERCLA, addresses the right of "a responsible party to recover from another responsible party that portion of its costs that are in excess of its portion of its *pro rata* share of the aggregate response costs." *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995).

An action in contribution is retrospective in nature, as a plaintiff seeking contribution is required to demonstrate payment of more than its share of a common liability and, therefore, entitlement to reimbursement. *United States v. Davis*, 20 F.Supp.2d 326, 337 (D.R.I. 1998), citing *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, *supra* at 100.

As opposed to an action for cost recovery under CERCLA § 107, where liability is joint and several, liability in a § 113 contribution action is merely several, so that a party from whom contribution is sought is responsible only for its equitable share of the response costs. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998). Accord, *United States v. Davis*, 31 F.Supp. 2d 45, 62 (D.R.I. 1998); *United States v. Kramer*, 953 F.Supp. 592, 600 (D.N.J. 1997).

Nevertheless, it does not necessarily follow that a § 113 award must equal each defendant's *pro rata* share of wrongdoing. *United States v. Davis*, 31 F.Supp.2d at 62.

Instead, in determining a party's equitable share of response costs a court has broad discretion to "construct a flexible decree balancing all the equities in the light of the totality of the circumstances." *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991). *Accord, United States v. Davis*, 31 F.Supp.2d at 62; *Browning-Ferris v. Ter Maat*, 13 F.Supp.2d 756, 773 (N.D.Ill. 1998); *United States v. Kramer, supra* at 597; *Farmland Industries, Inc. v. Colorado & Eastern R. Co.*, 944 F.Supp. 1492, 1498 (D.Colo. 1996); *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 846 (10th Cir. 1993). That equitable share award may also include any liability apportioned as "orphan shares" or shares of liability attributable to unknown or insolvent PRPs. *United States v. Davis*, 31 F.Supp.2d at 62, citing *United States v. Kramer, supra* at 598 and *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997). It is the burden of the party seeking contribution to prove not only that a particular defendant shares in the common liability, but also what portion of that liability is attributable to that defendant. *United States v. Davis*, 31 F.Supp.2d at 63. Courts are required to employ moral, as well as legal, sense in rendering decisions as to equitable apportionment. *United States v. R.W. Meyer, Inc., supra* at 572.

A plethora of equitable factors have been applied by the courts in resolving this issue, including those referred to as the "Gore factors"[19]:

(1) The ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;

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[19] The name derives from now Vice President Albert Gore, who as a Congressman sponsored a bill enumerating the factors.

(2) the amount of the hazardous waste involved;

(3) the degree of toxicity of the hazardous waste involved;

(4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

(5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(6) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or environment.

Id. at 571 (Citations omitted.) Other factors applied by courts have included the parties' states of mind, their finances, their relative fault, any benefits deriving from the actionable activities, knowledge/acquiescence regarding the hazards involved, matters pertaining to causation and the degree of care exercised while managing a Superfund site. *Farmland Industries, Inc. v. Colorado & Eastern R.Co., supra* at 1498, citing *United States v. R.W. Meyer, Inc., supra* at 572; *B.F.Goodrich Co. v. Murtha*, 958 F.2d 1192 (2nd Cir. 1992); *Weyerhaeuser Co. v. Koppers Co.*, 771 F.Supp. 1420, 1425 (D.Md. 1991); *Environmental Transp. Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *Hatco Corp. v. W.R. Grace & Co.*, 836 F.Supp. 1049, 1079, 1081 (D.NJ 1993). Courts have also looked to whether any efforts have been made to prevent harm to the environment and what efforts have been made to settle the case. *United States v.*

Davis, 31 F.Supp.2d at 63, citing *United States v. Atlas Minerals & Chem., Inc.*, C.A. No. 91-5118, 1995 WL 510304, at *86 (E.D.Pa. Aug. 22, 1995).

These factors are numerous, but not exclusive, and applying them in order to determine allocation requires a court to "[u]nravel a 20-year process involving millions of cubic yards of waste and complex ecological, biological and geological forces" and "to assess fault on a 'sliding scale' that makes unacceptable methods that may have been acceptable when they were employed." *United States v. Davis*, 31 F.Supp.2d at 63, quoting *Browning-Ferris v. Ter Maat*, 13 F.Supp.2d 756, 777 (N.D.Ill. 1998).

In the present case Olin has met its burden of demonstrating that GenCorp shares in the common liability for the sites in question, but now must prove what portion of that liability is GenCorp's.

Olin asserts that the parties each bear 50% liability for the response costs incurred and to be incurred in the future at Big D, and that GenCorp is liable for two thirds of the past and future response costs at Fields Brook. GenCorp counters that once equitable factors are applied, its allocable share of responsibility for costs at either Fields Brook or Big D should be reduced to 0% and, therefore, Olin should bear 100% responsibility for the wastes generated and hazardous substances released.

Also applicable to an assessment of the relative fault of the parties is this Court's prior analysis of the evidence of record to determine: (1) that although there was no joint venture between the parties in the present case, Olin and GenCorp did form an association or commercial entity, i.e., the creation of a TDI Plant for the production of TDI to be sold by Olin and

purchased by GenCorp for use in its manufacturing of PVC products, so that GenCorp could be deemed liable as an operator of the TDI Plant; (2) that GenCorp may be considered liable as an operator of the plant in light of the fact that GenCorp played a role in managing, directing, or conducting operations specifically related to pollution; (3) that GenCorp would be liable as an owner of the property upon which the TDI Plant was built; and (4) that GenCorp may be considered liable as an arranger for the Big D Site. Based on that analysis and the conclusions premised thereon, this Court concludes that GenCorp's relative fault with regard to the Fields Brook and Big D Sites would not rise to the levels asserted by Olin, but rather would lie somewhere between 0% and 50% for each site.

The first, second and fourth Gore factors[20] are not applicable in the present case where liability derives from the output of a single facility, as opposed to waste from several locations deposited at a single site, as well as from a business relationship where both parties took part in generating, transporting and disposing of the hazardous waste at issue. For the same reason the third factor, i.e., the toxicity of the waste, would be indistinguishable amongst the parties.

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[20] Those factors are, respectively, the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished, the amount of waste involved, and the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste.

The fifth Gore factor[21] would operate in favor of GenCorp as regards the plant site. Olin and GenCorp did not have equal authority to exercise such care, having contractually agreed that Olin would construct, own and operate the TDI Plant, which it would sell to GenCorp five years later but prior to that sale was to instruct GenCorp in its process for manufacturing TDI, would sell TDI to GenCorp, and would be responsible for taxes and other liabilities relating to the TDI Plant, as well as for obtaining any licenses or permits relating to the TDI Plant. The same holds true with regard to depositing wastes at Big D.

The final Gore factor, being the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment, has been negatively impacted by reason of actions taken by Olin.

As the factual summary at the outset of this opinion reveals, environmental problems related to the TDI Plant began to appear in the early 1970's and by the late 1970's Olin became aware of Big D leachate seepage into groundwater. Remediation of Big D by Olin began in 1980 and remediation and closure of the TDI Plant Site occurred in 1982. It was not until 1986 that Olin, in the official corporate response to a federal Section 104(e) request concerning Fields Brook, identified GenCorp to any regulatory agency as an alleged co-operator of the TDI Plant.

Negotiations between Olin, the US EPA and the OEPA regarding clean-up of Big D spanned the 1980's through the

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[21] The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such waste.

early 1990's, with the final version of the ROD for the Big D Site having been signed on September 29, 1989 and the US EPA UAO for the implementation of RD/RA for the Big D Site having been issued on March 27, 1990. Only Olin and Mr. Andrew Dreslinski, the original property owner of the Big D Site, were named as PRPs in the administrative order. Ultimately, when negotiations with Olin failed, the US EPA hired a contractor to perform the RI/FS on the Big D Site.

Despite the lengthy span of environmental problems pertaining to disposal of waste generated by the TDI Plant and negotiations with governmental entities pertaining thereto, it was not until July of 1991 that Olin first notified GenCorp of its potential liability for its "share of the proper allocation of response and remediation costs incurred and to be incurred" at the Big D and Fields Brook Sites.

Having completely excluded GenCorp during more than a decade of negotiations with the US EPA and OEPA, Olin is now incredulous that at the point at which Olin informed GenCorp of its potential liability GenCorp was "recalcitrant" and "refused to cooperate with Olin." As evidence of GenCorp's lack of cooperation Olin points to the fact that after learning of Olin's claim GenCorp did not initiate meetings with the regulatory authorities "to attempt to change the remedy called for in the Big D UAO," nor did GenCorp "ever offer to help Olin remediate the Big D Site."

Stated differently, Olin foreclosed GenCorp from cooperating with the regulatory authorities during years of negotiation and decision making with the US EPA and OEPA and then, after extensive clean-up work was underway with mounting costs, called upon GenCorp to be a partner in cost-sharing as a *fete accompli*. That demand was made nearly two decades after the parties entered into an agreement

terminating the 1962 Agreement and Olin bought out GenCorp's right to purchase the Ashtabula TDI Plant and returned the earnest money paid by GenCorp.

It is the opinion of this Court that in the context of this case GenCorp's lack of cooperation with the regulatory authorities is a demerit to Olin, not GenCorp.[22]

Traditional equitable defenses may also be considered as mitigating factors. *United States v. R.W. Meyer, Inc., supra* at 573.

GenCorp argues that the doctrine of laches bars Olin's contribution claims against it. In a Memorandum and Opinion dated April 19, 1995 this Court held that although the equitable defense of laches could not be used to bar the claims for relief raised in the counterclaim, it could be considered as a factor in allocation of contribution shares.

Although typically laches operates as a complete defense to a claim asserted after an unreasonable delay, in this case Olin's delay in notifying GenCorp of potential liability would only serve as an equitable factor, to be considered along with others in determining allocation issues, so that the parties' extensive analysis of the doctrine of laches, complete with discussion of presumptions and caselaw, is not really germane in this context.

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[22] In addition, it was Olin's lack of cooperation with the US EPA that caused the hiring of an outside contractor to perform the RI/FS work at Big D.

Instead this Court will consider Olin's delay as impacting upon the final Gore factor, operating to decrease GenCorp's share of liability herein.

As another equitable consideration GenCorp argues that Olin must bear full responsibility for wastes generated and hazardous substances released after October 1, 1973,[23] whereas Olin argues that the date is inconsequential in light of the fact that even after that date GenCorp continued to be an arranger for disposal of hazardous waste from the TDI Plant. Olin further argues that even if GenCorp was not deemed to have been an arranger after 1973 the hazardous materials previously deposited at Big D (estimated at 46 million pounds of TDI residue, which was 82.3% of the total, and 5900 drums of spent vacuum pump oil, which was 87% of the total) would have been dealt with in the same manner as it would have been if there had been no waste dumped after 1973. Moreover, Olin claims that any contamination to the TDI Plant Site and Fields Brook deriving from the TDI manufacturing process had already occurred, so that even absent operations post-1973 the same environmental clean-up would have been necessary. In support of that argument Olin focuses on volume as one equitable basis for division of remediation expenses between the pre- and post-1973 periods, arguing that since a larger volume of waste was dumped at Big D prior to 1973 a higher percentage of costs should be allocated for that period and vice versa. Olin also relies upon toxicity as another factor impacting upon allocation, arguing that the waste produced at the TDI Plant prior to 1973 was more toxic than that produced after that time, so that higher

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[23] In the 1971 Agreement Olin and GenCorp agreed that the 1962 Agreement would be terminated as of October 1, 1973.

costs should be allocated to waste generated pre-1973 and divided equally among the parties.

In this Court's opinion, the distinction between pre- and post-1973 activities would not significantly impact a determination of each party's equitable share of response costs.

This Court has found that as regards the pre-1973 toxic waste there was only one facility producing and disposing of it, so that the volume of waste produced during that period as to each of the parties would be indistinguishable, as would the toxicity of that waste.

As regards post-1973 activities this Court has held that GenCorp is responsible as a person who "otherwise arranged" for the disposal of hazardous wastes by reason of the nature of its continuing relationship with Olin involving the TDI Plant. In terms of allocation of costs, however, that responsibility is offset by Olin's continued operation of the plant. This is especially true considering the extent of the contamination of Big D, Fields Brook and the plant site prior to 1973, which would have had to be addressed even if there had been no post-1973 activities.

GenCorp next asserts that it should not bear any share of liability allocable to Mr. Brenkus as a transporter of waste to Big D and to the Dreslinskis as the former owners of the Big D Site, arguing that (1) since liability in a § 113 contribution action is several, GenCorp cannot be held accountable for more than its equitable share of the response costs for Fields Brook and Big D, which would occur if the shares of liability attributable to the Dreslinskis and Mr. Brenkus were imposed upon GenCorp, and (2) since Olin previously settled its CERCLA claims against the Dreslinskis any claim against

GenCorp for Big D should be reduced by the Dreslinskis' equitable share of liability.

Olin counters that in allocating response costs in a § 113 action non-parties such as the Dreslinskis and Mr. Brenkus must be disregarded and the entire amount of response costs at Big D should be allocated between the parties herein. Moreover, Olin posits that since the Dreslinskis and Mr. Brenkus are "impecunious" their shares would be deemed "orphan shares" and apportioned between Olin and GenCorp. Finally, Olin argues that its contractual relationship with the Dreslinskis has no bearing on allocation of response costs.

Under § 113 liability is several so that the total clean-up costs, including responsibility for orphan shares, is allocated between the parties pursuant to application of equitable factors discussed previously herein. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., supra* at 354. "Orphan shares" have been defined by the Sixth Circuit as "response costs attributable to insolvent or defunct PRPs at a site, which are unable to be recovered." *Ibid.* A district court in a § 113 contribution action may apportion the amount of orphan shares "*to the parties*." (Emphasis added.) *Ibid*, citing *Sun Company, Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997), *cert. denied* __ U.S.__, 140 L.Ed.2d 110 (1998). Consequently, a plaintiff will not automatically be "stuck" with orphan shares. *Ibid.* Accord, *Charter Township v. American Cyanamid Co.*, 898 F.Supp. 506, 508 (W.D.Mich. 1995).

Upon hearing the evidence presented at trial in the present case this Court commented that it would be futile to organize

the Dreslinskis and Mr. Brenkus[24] into a PRP committee, given their financial status. GenCorp does not dispute the impecuniousness of the Dreslinskis. Mr. Brenkus' waste hauling company, responsible for transporting wastes from the TDI Plant to Big D, was dissolved in 1981 and there is neither evidence calling for piercing that company's corporate veil to hold Mr. Brenkus liable, nor is there evidence that the company he subsequently formed is a successor to the liabilities of the preceding waste hauling company. Consequently, their shares of any response costs would not be recoverable based upon what this Court heard at trial in these proceedings, so that they can be labeled as "orphan shares." As such, those shares may be apportioned among the parties herein, and not just allocated to Olin as GenCorp argues.[25]

As regards GenCorp's assertion that Olin's settlement agreement with the Dreslinskis mandates a reduction of GenCorp's share of responsibility for response costs for Big D by the Dreslinskis' equitable share of liability, this Court does not agree.

The Dreslinski property was purchased by Olin as a result of the Big D Site Team's recommendations that doing so would facilitate clean-up of the site in the following ways: (1) the purchase included land adjoining the site which could

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[24] The Dreslinskis and Mr. Brenkus are not parties to the contribution action, but could have been if GenCorp had decided to implead them.

[25] GenCorp's argument that to allocate to it orphan shares would be to saddle it with the liability of others, which is not permitted when one is severally liable, was considered and rejected by the court in *U.S. v. Kramer*, 953 F.Supp. 592, 600 (D.N.J. 1997).

be utilized by Olin to support its clean-up operations on the site; (2) purchasing the property provided Olin with full management and control over the property, which avoided potential problems with the Dreslinskis over decisions pertaining to the property; (3) the purchase would also avoid problems and costs associated with property damage claims during the clean-up; (4) the purchase provided a release from future liability claims by the Dreslinskis and, therefore, was worth the property's fair market value; and (5) purchasing the property resulted in the closing of the campground on the property adjacent to the site, which in turn diminished the risk of liability claims from campers. The deal paved the way for the clean-up of the site pursuant to the terms of the UAO issued by the EPA.

GenCorp calls into consideration the following language from the 1991 Purchase Agreement under which Olin purchased from the Dreslinskis the property upon which the Big D Site was located:

> Except as otherwise provided herein and in further consideration of this Agreement and subject to the mutual promises contained herein, the undersigned OLIN CORPORATION, its respective divisions, all related companies, successors and assigns, do hereby fully, finally and forever release and discharge ANDREW DRESLINSKI AND BARBARA DRESLINSKI, their heirs, dependents, beneficiaries, executors, administrators, successors and assigns of and from all claims, demands, actions, causes of action, suits, damages, losses and expenses of any and every nature whatsoever under federal or state law which might be asserted by or on behalf of OLIN or anyone claiming by, through or for OLIN, which

> OLIN may have as of the date of the execution of this Agreement.

GenCorp argues that "[c]ourts which have considered the effect of a settlement upon a private (non-governmental) PRP's cost recovery action have adopted the Uniform Comparative Fault Act view that the PRP's claim against any nonsettling defendants 'is reduced by the amount of the release person's equitable share of the obligations....'" In support of the foregoing, GenCorp cites Section 6 of the Uniform Comparative Fault Act, 12 U.L.A. supplement at 57[26] and a number of cases.

This argument fails for each of several reasons.

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[26] That provision states:

> A release, covenant not to sue, or similar agreement entered into between a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other person liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the release person's equitable share of the obligations....

First, the UCFA provision[27] regarding settlement offset does not apply to settlements with persons who are not parties to the contribution action. The comments to the UCFA specifically address the issue as follows:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him. Both plaintiff and defendants will have significant incentive for joining available defendants who may be liable. The more parties joined whose fault contributed to the injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

UCFA, Comment to Section 4, 12 U.L.A. 51 (Supp. 1995). It follows that the total percentage of fault of the parties to the contribution action must add up to 100%. UCFA, Comment to Section 2, 12 U.L.A. 51 (Supp. 1995).

The case law cited by GenCorp does not hold otherwise. In *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685

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[27] The language specifically instructs courts to determine "the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third party defendant, and person who has been released from liability [through settlement]...." Section 2(a)(2) of the UCFA, 12 U.L.A. 51 (Supp. 1995)(Emphasis added.)

F.Supp. 651 (N.D.Ill. 1988), the court held that the UCFA did not provide a remedy for contribution since the United States, the "injured party" in the case, had no cause of action against the parties from whom contribution was sought by the plaintiff. The balance of the cases are inapplicable in that they involve settlements between parties to the litigation at issue, so that the courts in those cases were able to adjudicate the rights of the settling parties and the other non-settling defendants. In all but one of those cases[28] the settlement agreements were before the court for approval and in the one other case,[29] there were oral arguments and briefs submitted by the settling parties, who also were parties in the case, prior to the court ruling on the rights of the litigants.

As regards the specific terms of the indemnification, the parties disagree over the extent of the indemnification promised by Olin and whether the indemnification would still be in effect considering the Dreslinskis' having exercised their option to re-purchase the property, but in light of the fact that this Court has determined that the Dreslinskis' shares are "orphan shares," any release would be meaningless.

Consequent to the foregoing, this Court finds that any shares of liability attributable to the Dreslinskis and Mr. Brenkus are to be apportioned among the parties herein.

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[28] *American Cyanamid Co. v. King Indus., Inc.*, 36 E.R.C. 1435 (D.R.I. 1993); *Comercia Bank-Detroit v. Allen Indus., Inc.*, 769 F.Supp. 1408 (E.D.Mich. 1991); *United States v. Western Processing Co.*, 756 F.Supp. 1424 (W.D.Wash. 1990); *New York v. Exxon Corp.*, 697 F.Supp. 677 (S.D.N.Y. 1988).

[29] *Luncott Corp. v. Chemical Waste Mgmt., Inc.*, 690 F.Supp. 1409, 1411 (E.D.Pa. 1988).

Upon weighing all the foregoing factors, this Court finds that Olin should bear 70% of the costs associated with clean-up of the Big D Site and GenCorp should bear 30% of the costs of that site. As regards Fields Brook, this Court finds that Olin is responsible for 60% of the costs associated with clean-up and GenCorp is responsible for 40% of those same costs.

A Phase III trial will be conducted to determine specific amounts attendant to the aforementioned percentages.

Also pending before this Court is the motion of Olin pursuant to Rule 15(a) and (d) of the Federal Rules of Civil Procedure for leave to amend and supplement its counterclaim to include, as an additional element of Olin's claim to recover against GenCorp, those past and future costs associated with the impact of Fields Brook upon the Ashtabula River.

Olin asserts that many of the PRPs in the Fields Brook Superfund litigation, including Olin and GenCorp, have entered into agreements to investigate contamination of the Ashtabula River deriving from Fields Brook, as well as another agreement to contribute funds for further investigation of, and perhaps dredging of, the Ashtabula River to eliminate hazardous substances in the river. In executing those agreements, Olin acquiesced to "fronting" costs, while reserving the right to take measures to recover from GenCorp its share of those costs. Olin represents that it has incurred response costs for the Ashtabula River and projects continued expenditures in the future associated with hazardous chemicals which flowed from Fields Brook into the Ashtabula River.

GenCorp's opposition to the motion is premised upon concerns that this Court will preclude further discovery

related to issues of liability and allocation pertaining to the Ashtabula River. GenCorp argues that granting the motion to amend while at the same time precluding further discovery would unduly prejudice GenCorp, as Ashtabula River monitoring and clean-up costs were not previously part of this litigation.

Olin has offered what this Court believes to be an acceptable compromise geared to avoiding any further delay in these proceedings by proposing that, in granting the motion to amend, discovery directed to the Ashtabula River be permitted, provided that the following two conditions are met: (1) the discovery be conducted at the same time as discovery directed to the Phase III proceeding on damages; and (2) the discovery must be limited in scope with the parties to agree to the parameters, or in the event they are unable to do so, this Court will set the parameters.

Olin's motion to amend and supplement its counterclaim to include, as an additional element of Olin's claim to recover against GenCorp, those past and future costs associated with the impact of Fields Brook upon the Ashtabula River (Docket #412) is hereby granted, and the parties have sixty (60) days from receipt of this opinion to submit written proposed parameters for the Phase III discovery.

IT IS SO ORDERED.

/s/_____
David S. Perelman
United States Magistrate Judge

DATE: July 14, 1999

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

(2)

No. 05-11

In the Supreme Court of the United States

GENCORP INC.,

Petitioner,

v.

OLIN CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived any argument regarding the propriety of Olin's claim for contribution under CERCLA § 113(f)(1) by failing to raise that argument on appeal.

2. Whether, in any event, the "during or following" requirement of Section 113(f)(1), as interpreted in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004), was satisfied in this case because, as to each site at issue, Olin was sued under CERCLA § 107(a) before Olin asserted any contribution claim against petitioner concerning that site.

3. Whether the "during or following" requirement of Section 113(f)(1) was satisfied in this case because, before asserting any contribution claim against petitioner, Olin had been subjected to a unilateral administrative order issued by the United States under CERCLA § 106, directing Olin to conduct the cleanup for which contribution was sought.

4. Whether a person that extensively controlled and handled hazardous manufacturing substances, which were then transported offsite for disposal, "owned or possessed" the substances within the meaning of CERCLA § 107(a)(3).

5. Whether, after *United States v. Bestfoods*, 524 U.S. 51 (1998), a person that made numerous decisions concerning disposal practices for hazardous manufacturing substances and actively participated in the removal of such substances for offsite disposal is liable as an "arranger" for such disposal under CERCLA § 107(a)(3).

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent Olin Corporation states that it has no parent corporation and no publicly-held company owns 10 percent or more of Olin Corporation's stock.

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STATEMENT OF THE CASE

A. GenCorp's Unique Business Relationship With Olin

On June 21, 1962, GenCorp and Olin entered into an agreement (the "1962 Agreement") to erect, manage, and operate a manufacturing plant for toluene di-isocyanate ("TDI") in Ashtabula, Ohio (the "TDI Plant"). Pet. App. 5a. The plant was built on GenCorp's land next to GenCorp's existing polyvinyl chloride ("PVC") plant, because TDI was a critical ingredient in GenCorp's process for making PVC. *Id.* The contractual relationship that Olin and GenCorp formed in 1962 was not a mere "supply contract," as GenCorp now seeks to portray it. Pet. 4. Rather, GenCorp and Olin created what the court of appeals described as a "unique business relationship," Pet. App. 28a, one that "defies easy categorization," *id.* at 4a, in which the parties agreed to share construction costs, the output of the TDI Plant, the capital and operating costs of TDI production, and responsibility for the construction, operation, and management of the TDI Plant.

The TDI Plant was a joint undertaking from the very beginning. GenCorp advanced up to 50% of the construction cost for the TDI Plant, agreed to purchase 50% of the TDI produced at the plant, and paid for its TDI "take" at cost, including its *pro rata* portion of (a) the variable cost to produce TDI, (b) fixed costs for the TDI Plant, and (c) the cost for a chemical ingredient charged to the TDI Plant under a formula that "was not a typical purchase/sale" arrangement. Pet. App. 6a, 44a-45a, 48a. GenCorp supplied the hourly labor for the TDI Plant and a number of first-tier managers as well, all kept on GenCorp's payroll and, where applicable, subject to GenCorp's labor agreements with unions representing GenCorp workers. *Id.* at 7a. GenCorp charged Olin a nominal $10 per year "rent" for the land. *Id.* at 5a.

The 1962 Agreement called upon Olin to provide GenCorp with training and detailed technical information concerning the TDI process and eventually to transfer the TDI Plant to

GenCorp at a future date. Pet. App. 42a-43a. As a result, GenCorp was intimately involved in the plant's design, construction, and operation. GenCorp approved the original designs and specifications for the TDI Plant and capital appropriation requests for the plant made by Olin. *Id.* at 8a. A four-member committee with equal representation from GenCorp and Olin (the "TDI Committee") was established and charged with "'oversee[ing] the construction, operation and management of the TDI Plant.'" *Id.* at 6a-7a, 43a (quoting 1962 Agreement, ¶ II.A). The plant manager was an Olin employee appointed after consultation with GenCorp; he received his instructions from the TDI Committee through one of its members. *Id.* at 7a. The TDI Committee met regularly to set goals, review plant operations, and establish plant policies and procedures. Through its members on the TDI Committee, GenCorp shared decision-making responsibility for the TDI Plant equally with Olin.[1]

B. GenCorp's Activities As "Operator" Of The TDI Plant And "Arranger" For The Disposal Of Hazardous Wastes From The TDI Plant

With the TDI Plant designed to generate significant quantities of toxic residue on an ongoing basis, management of hazardous wastes was a major consideration from the outset. Pet. App. 46a-47a. During the initial design phase, GenCorp's supervising engineer became concerned about the danger of drumming chemical residue from TDI production and burying the drums offsite. *Id.* at 7a-8a. GenCorp nonetheless approved

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[1] The TDI Plant ultimately was not sold to GenCorp as envisioned under the 1962 Agreement. Instead, the parties entered a new contract and terminated the 1962 Agreement, effective in 1973. Pet. App. 9a. Under the parties' new contractual arrangements, the TDI Committee was dissolved, GenCorp employees at the TDI Plant were transferred to Olin, Olin reimbursed GenCorp for a deposit made toward the purchase of the TDI Plant, and GenCorp agreed to purchase at least 80% of its annual TDI requirements from Olin at the lesser of market price or cost. *Id.* The TDI Plant was closed and the structures dismantled in 1981. *Id.* at 55a.

the plant design over his objections. *Id.* GenCorp and Olin explored ways to reduce the volume of waste disposal by jointly funding "Golden TDI" research to seek commercial uses for the residue. *Id.* at 9a. The parties also funded capital projects to reduce the volume of waste generated by the TDI Plant. *Id.* at 8a. The cost of residue disposal was a budget line-item charged to the TDI Plant and allocated as a variable cost, with GenCorp paying its *pro rata* share. By approving the TDI Plant budget, GenCorp directly authorized the expenditure of funds for TDI residue removal and disposal. *Id.*

The handling of hazardous TDI waste was addressed by the TDI Committee in a variety of ways in addition to these financial arrangements. Pet. App. 8a. Because of GenCorp's familiarity with the Ashtabula area, GenCorp's TDI Committee members were asked to recommend waste disposal locations for the residue. *Id.* A local hauler was selected to transport TDI waste to a landfill known as the Big D Campground ("Big D"), which served as the primary location for offsite waste disposal from the TDI Plant for more than a decade. *Id.* Robert Laundrie, a GenCorp TDI Committee member, inspected Big D in 1965 not long after the TDI Plant was in full operation. *Id.* at 49a-50a. He admonished the plant manager to correct what he perceived to be serious problems at the landfill, including inadequate cover over the waste, liquids being dumped improperly in areas designated for solid wastes, liquids not being contained properly so that they flowed to an adjacent river, lack of warning signs, and obnoxious odors. *Id.* Mr. Laundrie inspected the landfill several years later and again voiced concern. *Id.* at 51a.

GenCorp also conducted operations at the TDI Plant specifically related to pollution and had extensive, first-hand involvement in the disposal of hazardous wastes from the TDI Plant. Neil Hainline, a GenCorp manager, was in charge of day-to-day operations at the TDI Plant, a responsibility that included removal of TDI waste. Pet. App. 84a. GenCorp hourly personnel, directed by GenCorp shift supervisors,

removed wastes from TDI production facilities, drummed the wastes for transport to Big D, and loaded the drums onto the transporter's trucks. *Id.* GenCorp employees also spilled hazardous substances on the ground at the TDI Plant site, causing contamination of Fields Brook, an adjacent waterway. *Id.* at 83a, 84a. A GenCorp engineer working at the TDI Plant signed and approved service orders for transporting residue offsite. *Id.* at 8a, 84a-85a.

C. EPA's Section 106 UAOs And The Lawsuits Against Olin Under Section 107(a)

In 1983, the United States Environmental Protection Agency ("EPA") placed Big D and Fields Brook (including the TDI Plant) on the National Priorities List of severely contaminated sites to be remediated under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), and EPA later declared Olin to be a "potentially responsible party" ("PRP") for Big D. Pet. App. 10a. EPA engaged consultants to investigate the Big D site and recommend remedial alternatives. *Id.* at 10a. In September 1989, EPA released its final remedy decision for Big D, *id.*, requiring excavation and incineration of all contaminated soils and treatment of the groundwater at the landfill.

An effort by Olin and EPA to agree on terms for implementation of the remedial plan by Olin failed after several months of negotiations. Pet. App. 59a. Then, on March 27, 1990, EPA issued a Unilateral Administrative Order ("UAO") under CERCLA § 106, 42 U.S.C. § 9606(a), directing Olin to perform the remedy at Big D. *Id.* In a section of the order headed "Penalties for Noncompliance," EPA warned Olin that severe monetary sanctions are available under CERCLA § 106(b), 42 U.S.C. § 9606(b), for any willful violation or refusal to comply, including fines of up to "$25,000 for each day in which such violation occurs or such failure to comply continues." Big D UAO, Mar. 27, 1990, ¶ 52. Rather than

risk significant civil penalties, Olin complied. Excavation at Big D commenced in September 1992. Pet. App. 61a. Through 1999, the cutoff date for the damages phase of this case, Olin had spent more than $60 million to comply with the UAO for Big D.[2]

To force Olin's hand still further before the cleanup started, EPA sued Olin under CERCLA § 107(a), 42 U.S.C. § 9607(a), in the United States District Court for the Northern District of Ohio. *United States v. Olin Corp.*, No. 4:91 CV1731 (N.D. Ohio filed Sept. 3, 1991). EPA's suit asserted that Olin had arranged for the disposal of hazardous substances at Big D, causing extensive soil and groundwater contamination, and that a comprehensive remediation project had to be implemented for the site, as called for in EPA's final remedial decision. Compl., ¶¶ 6, 11-13. In particular, EPA alleged in its complaint against Olin that

> The United States has incurred response costs, and will continue to incur response costs . . . including the costs for removal and remedial actions as defined in [CERCLA], to respond to the release and threatened release of hazardous substances at the Big D Campground Site.

Id., ¶ 22. Contrary to GenCorp's characterization, EPA did not bring the Section 107 claim merely "to recover oversight costs." Pet. 5 n.1. Rather, the government actually sought a judgment against Olin for "all response costs incurred by the

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[2] EPA conducted a similar process for responding to contaminants in Fields Brook and adjoining properties. Olin was named a PRP for the TDI Plant, GenCorp was named for its PVC plant, and other companies were named for their manufacturing facilities located along the waterway. Pet. App. 58a. EPA issued a Section 106 UAO for the Fields Brook site on March 22, 1989, ordering Olin, GenCorp, and other PRPs to carry out additional investigations and remedial design and pre-design activities. *Id.* at 58a-59a. A multi-million dollar outlay was required to comply with the Fields Brook UAO, which Olin paid to conduct investigations, feasibility studies, and other remedial actions related to contamination of the TDI Plant site. *Id.* at 61a & n.8.

United States" for Big D and a declaration that "Olin will be liable for all future costs incurred by the United States" for response actions going forward. Compl., at pp. 6-7.[3]

Faced with the UAO to remediate Big D and, if Olin declined, the threat of Section 106 civil penalties and a money judgment in EPA's Section 107(a) action requiring Olin to pay the government for cleaning up the site, Olin yielded to EPA's demands and performed the Big D cleanup in accordance with the UAO. After the remediation project was well underway, Olin and EPA settled EPA's Section 107(a) action pursuant to a consent decree entered on May 5, 1994, under which Olin agreed to pay all of the government's response costs, as well as the government's costs for supervising Olin's cleanup activities.[4] Consent Dec. ¶¶ 10, 13.

D. Proceedings In The District Court

GenCorp filed this action in October 1993, seeking a declaration that GenCorp was not liable for Big D, Fields Brook, and certain other sites, under CERCLA §§107(a) and 113(f), 42 U.S.C. §§ 9607(a), 9613(f). Pet. App. 11a. GenCorp alleged that it neither operated the TDI Plant with Olin nor arranged with Olin for the disposal of TDI Plant wastes at Big

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[3] Two years earlier, in September 1989, EPA filed suit under Section 107(a) of CERCLA for the Fields Brook site against Olin, GenCorp, and other PRPs. *United States v. GenCorp Inc.*, No. 5:89 CV1866 (N.D. Ohio filed Sept. 29, 1989). In that litigation, the government likewise sought recovery for response costs incurred by EPA in connection with releases and threatened releases of hazardous substances. Olin, GenCorp, and several other PRPs settled the government's Section 107 action for Fields Brook by entering a consent decree approved by the court on August 6, 1992, under which the settling parties reimbursed the government's response costs, plus interest. Pet. App. 60a-61a.

[4] In the event Olin failed to complete the Big D cleanup in accordance with the UAO, the consent decree expressly reserved the government's right to file suit under CERCLA in the future against Olin for injunctive relief, for the government's future response costs, and for any other relief relating to the site. Consent Dec. ¶ 17.

D. *Id.* at 62a. Olin promptly counter-claimed, alleging that GenCorp was both an operator of the TDI Plant and an arranger for offsite disposal of TDI residue and other hazardous substances. *Id.* Olin's counterclaim sought a monetary judgment under Section 107(a) and Section 113(f) of CERCLA for at least one-half of Olin's response costs and a declaratory judgment holding GenCorp liable for any additional response costs as Olin incurs them in the future.

The trial judge dismissed Olin's Section 107(a) claim after the court of appeals ruled, in *Centerior Servs. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), that PRPs are not eligible to recover from other PRPs under that section of CERCLA. Pet. App. 11a. The district court issued a written opinion in 1999, finding GenCorp liable under CERCLA for the Fields Brook site, as an "operator" of the TDI Plant and "owner" of the land, and, for Big D, as an "arranger" for the disposal of hazardous substances at that site. Pet. App. 85a-86a, 91a. After further proceedings, another opinion covering damages issues followed in May 2002.

Before the court entered final judgment, GenCorp sought to have these rulings nullified in light of the Fifth Circuit panel decision in *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001) ("*Aviall I*"). The issue in that case was whether a pending or completed civil action under Section 106 or Section 107(a) is a prerequisite to the filing of a Section 113(f)(1) contribution claim, 42 U.S.C. § 9613 (f)(1). A divided panel of the Fifth Circuit answered that question in the affirmative. 263 F.3d at 145. The Fifth Circuit then granted a petition for rehearing *en banc*, 278 F.3d 416 (5th Cir. 2001), and the United States filed a brief as *amicus curiae* urging the *en banc* court to affirm.

Pointing to these developments, GenCorp asked the district court to dismiss Olin's Section 113(f)(1) claim and revoke its liability determination. While GenCorp's motion was pending in the district court, the *en banc* Fifth Circuit reversed the

panel's decision. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) ("*Aviall II*"). Nevertheless, GenCorp again urged the trial judge to grant its motion by adopting the analysis of the United States and the *en banc* dissent. The district court denied GenCorp's motion, and entered judgment for Olin under Rule 54(b).[5]

E. Proceedings In The Court Of Appeals

GenCorp appealed, contending that the trial judge erred in finding GenCorp liable as an arranger for the cleanup of Big D. GenCorp did not, however, challenge the determination of owner and operator liability for the Fields Brook site, and thus the judgment for that site, which includes the TDI Plant, is now final. In attacking the district court's judgment of "arranger" liability, GenCorp argued, *inter alia*, that it did not "own or possess" the wastes within the meaning of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and that the judgment conflicts with this Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998).

The court of appeals affirmed. Pet. App. 3a-32a. As to the claim that GenCorp did not "own or possess" the TDI Plant wastes, the court observed first that "GenCorp did not squarely join this issue at the district court level . . . ." *Id.* at 24a. In any event, the court held GenCorp's argument is mistaken. As the court explained, "to say that the statute requires ownership or possession of the waste does not establish what evidence will satisfy the requirement or, more particularly, whether constructive ownership or possession will suffice." *Id.* at 25a.

The court ruled that the plain meaning of the statutory phrase "owned or possessed" includes "constructive" as well as "literal" ownership or possession, and that evidence of "control over hazardous waste" may be used to demonstrate

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[5] The district court retained jurisdiction of GenCorp's state-law claims for breach of contract. Pet. App. 12a-13a.

constructive ownership and possession. *Id.* at 25a-27a. The record evidence showing GenCorp's control over the hazardous TDI waste included: (a) GenCorp's financing of TDI Plant construction; (b) GenCorp's equal representation on the TDI Committee; (c) GenCorp's approval of design plans, capital appropriations, and budgets, "all of which contemplated continued offsite waste disposal"; and (d) the district court's finding—not challenged on appeal—that GenCorp was an "operator" under CERCLA by virtue of its own actions at the TDI Plant specifically related to pollution. *Id.* at 27a.

The court of appeals also rejected GenCorp's argument that the arranger liability judgment conflicts with this Court's ruling in *Bestfoods*. In that case, this Court addressed standards governing CERCLA "operator" liability in the context of a corporate parent being held liable for cleaning up a subsidiary's contaminated facility. Here, however, the dispute concerns the "arranger" (not "operator") liability of GenCorp for causing contamination at an offsite disposal facility. Pet. App. 23a-24a. Because *Bestfoods* does not alter "the basic principles for ascertaining 'arranger' liability," the court of appeals concluded that arranger liability is appropriate as long as the "alleged violator . . . independently satisf[ies] the test for CERCLA liability" under that provision. *Id.* at 24a. The test for arranger liability was satisfied based on GenCorp's own considerable involvement in waste disposal. *Id.*

After the district court rejected GenCorp's effort to challenge the propriety of Olin's contribution counterclaim under Section 113(f)(1), GenCorp elected not to appeal that ruling. Although GenCorp filed a statement in the court of appeals listing the so-called *Aviall* issue as one of GenCorp's expected grounds for appeal,[6] GenCorp then chose to omit any mention of the issue from its opening brief and reply brief in the court of appeals. GenCorp filed its opening brief on May

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[6] GenCorp filed its statement in the court of appeals after Cooper Industries petitioned for certiorari in this Court.

30, 2003, more than a month after this Court invited the Solicitor General to express the views of the United States on the petition filed by Cooper Industries. This Court granted review on January 10, 2004, and the merits briefs in the case (including a further *amicus* brief from the United States supporting Cooper Industries) all were filed well before the court of appeals heard oral argument in the present case on June 11, 2004. Yet GenCorp said nothing about the supposed *Aviall* issue.

The first time that GenCorp gave the court of appeals any indication that this Court's decision in *Cooper Industries* might have some bearing on the appeal was after the panel unanimously affirmed the judgment of the district court. GenCorp then petitioned for panel and *en banc* rehearing on the "own or possess" and "*Bestfoods*" issues. In the petition, GenCorp reported that *Cooper Industries* had been argued in this Court, and it asserted that, if the judgment of the Fifth Circuit was reversed, then "Olin's contribution claim in this case may be barred." Pet. for Reh'g at 14. GenCorp acknowledged that it had chosen not to raise the Section 113(f)(1) issue on appeal. GenCorp cited the *en banc* Fifth Circuit's ruling in *Aviall II* as the reason for its decision, but it did not explain why, after pursuing the Section 113 (f)(1) issue in the district court *after Aviall II*, it nevertheless elected to abandon the issue in the court of appeals. *Id.* After this Court decided *Cooper Industries* and reversed the *en banc* Fifth Circuit, 125 S. Ct. 577 (2004), GenCorp moved to vacate the judgment of the court of appeals. It also sought and obtained leave to file a reply in support of its petition for rehearing. The reply sought reversal on the ground that the "during or following" requirement of Section 113(f)(1), as construed by this Court in *Cooper Industries*, was not satisfied.

Olin responded that GenCorp had waived the issue decided in *Cooper Industries*, as well as the question whether a UAO issued under Section 106 qualifies as a "civil action" under that section for purposes of satisfying the "during or follow-

ing" requirement of Section 113(f)(1). As noted above, neither of these issues was mentioned in GenCorp's briefs on appeal. Olin also argued that the "during or following" requirement in Section 113(f)(1) was satisfied by the Section 107(a) cost recovery actions brought against Olin before Olin sought contribution from GenCorp.[7]

The court of appeals denied GenCorp's motion to vacate the judgment on January 21, 2005. The court denied GenCorp's petition for rehearing on March 29, 2005. Pet. App. 2a.

ARGUMENT

The unanimous decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It is also highly fact-specific, involving the legal consequences under CERCLA of a unique business relationship formed more than 40 years ago for the construction, management, and operation of a chemical manufacturing plant. Further review is not warranted.

GenCorp's effort to take advantage of this Court's decision in *Cooper Industries* is flawed in several respects.

First, GenCorp chose not to raise on appeal any issue regarding whether Olin's contribution counterclaim satisfied the requirements of CERCLA § 113(f)(1). Though it pursued

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[7] EPA's two lawsuits against Olin are not the only Section 107 actions that preceded Olin's contribution claim under Section 113(f)(1). Because Olin sought contribution as a *counterclaim* in GenCorp's lawsuit for a declaration of no liability to Olin under Section 107, Olin's claim was brought, quite literally, "during" GenCorp's Section 107 action against Olin. The district court's judgment also holds GenCorp liable for a landfill known as the Reserve Environmental Site ("RES"), which was used, along with Big D, for the disposal of TDI Plant wastes. Pet. 10-11 n.2. Olin was sued under Section 107(a) for RES by PRPs that owned and used that landfill. *Reserve Envtl., Inc. v. Detrex Corp.*, No. 4:93CV1157 (N.D. Ohio, filed as third party complaint against Olin on Nov. 12, 1993). Olin later amended its claim in this case to recover from GenCorp a portion of the settlement that ultimately was reached in the RES action.

such an argument in the district court, GenCorp did not mention any such issue in the court of appeals until it filed its petition for rehearing. GenCorp thus waived its opportunity to seek review in this Court on this ground.

Second, with respect to each of the contaminated sites at issue, before Olin filed any contribution claim against GenCorp, Olin already had been sued under CERCLA § 107(a). In particular, as to each site, EPA or a private party sued Olin under Section 107(a) before Olin sought contribution from GenCorp. Moreover, in this very case, GenCorp itself sued Olin for declaratory relief under Section 107(a) before Olin filed the contribution counterclaim that led to the judgment entered by the district court. Thus, Olin's contribution claim against GenCorp was filed "during or following" a civil action under Section 107(a), and the requirement of Section 113(f)(1) addressed in *Cooper Industries* was fully satisfied. This case therefore presents no occasion to consider the issue reserved in *Cooper Industries* (125 S. Ct. at 584 n.5), namely, whether a UAO issued under Section 106 qualifies as a "civil action under Section 106" within the meaning of the contribution provision in Section 113(f)(1).

Third, the issue reserved in *Cooper Industries* was not decided by the court of appeals in this case, and, as far as we are aware, it has not been decided by any other court of appeals either.[8] The issue was not briefed by the parties in the court below. This Court normally does not consider in the first instance issues not previously addressed in the courts of appeals. Petitioner's effort to persuade the Court to depart from this salutary practice is misguided. This is especially so because Olin proceeded against GenCorp in the district court through *both* a contribution claim under Section 113(f)(1) and an action to recover response costs under Section 107(a).

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[8] In dictum, the Fifth Circuit panel in *Aviall I* stated that a UAO issued under CERCLA § 106 *does* qualify as a "civil action under Section 106" for purposes of CERCLA's contribution provision. 263 F.3d at 140 n.5, 145.

Although the district court dismissed the Section 107 claim in reliance on the court of appeals' decision in *Centerior*, this Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), indicates that the district court's judgment in Olin's favor could be sustained under Section 107, even if Section 113 were for some reason unavailable.

Fourth, even if the Court were to reach the Section 106 issue that GenCorp seeks to present, GenCorp's position is incorrect on the merits. When EPA issues a UAO under Section 106, the recipient (like Olin in this case) is in no sense a "volunteer" in undertaking a cleanup. Rather, the cleanup is performed under government compulsion and with the threat of $25,000 per day sanctions if the UAO is not obeyed. There is no indication that Congress wanted to preclude an entity subject to such government compulsion from seeking contribution from other potentially responsible parties. The phrase "civil action" as used in Section 113(f)(1) is not defined in CERCLA, but it is broad enough to include administrative action such as a UAO. Once the government's enforcement authority has been brought to bear on a company like Olin, Section 113(f)(1) permits that company, while it is performing the cleanup ordered by the government, to seek contribution from other potentially responsible entities.

In a last-ditch effort to prolong this litigation, GenCorp suggests that, as an alternative to simply granting the petition, the Court should consider granting the petition, vacating the judgment, and remanding for further consideration in light of *Cooper Industries*. This proposal is without merit. In the first place, as GenCorp acknowledges (Pet. 7), *Cooper Industries* expressly reserved the issue petitioner seeks to have decided. Because *Cooper Industries* did not resolve or even discuss that issue, the decision provides no basis for further consideration by the court of appeals. Moreover, petitioner made extensive presentations about the *Cooper Industries* decision to the court of appeals, both in a motion to vacate the judgment and in a reply memorandum in support of the

petition for rehearing. Neither was successful, and, for all the reasons already discussed, there is no reason to believe that the court of appeals would act differently now.

Although GenCorp concentrates primarily on arguments that it did *not* make on appeal and that the court of appeals did not decide, it devotes the final four pages of its petition (Pet. 14-17) to two points that actually were litigated below. Neither warrants further review here.

First, CERCLA's "own or possess" requirement for arranger liability was satisfied here. GenCorp was actively involved in waste removal and made numerous decisions governing the disposal of hazardous TDI waste. The court of appeals correctly ruled that the control GenCorp exercised in matters concerning waste disposal "suffices to establish constructive ownership and possession" of the hazardous waste. Pet. App. 27a. No court has held that the "owned or possessed" language in CERCLA § 107(a)(3) does not include constructive ownership or possession, and there is no reason to believe that Congress used these words in CERCLA with a special definition more restrictive than that employed in numerous other federal statutes. Absent some contrary indication, ownership or possession includes constructive ownership or possession, as the court of appeals correctly held. *Id.* at 25a-26a. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), does not suggest otherwise. The term "possessed" does not even appear in the statutory provision at issue in *Dole Food*, which considered whether a governmental entity is "owned" by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2). Because it construes different language in an entirely separate statute, *Dole Food* does not govern the CERCLA provision at issue here. And, in any event, with respect to the large quantities of hazardous waste that GenCorp employees themselves placed in drums and loaded for disposal, GenCorp *actually* possessed the waste at issue.

Second, contrary to GenCorp's hyperbole, the court of appeals' ruling did not and would not permit "an end run around the *Bestfoods* liability limits." Pet. 17. In *Bestfoods*, the Court held that a parent corporation may be directly liable as an "operator" under CERCLA for *its own* actions at a contaminated facility owned by a subsidiary; by contrast, parental liability for actions *by the subsidiary* ordinarily would depend on whether the corporate veil could be pierced. No subsidiary of GenCorp is involved in this case. GenCorp's liability derives from GenCorp's own conduct, not that of any other entity. *Bestfoods* is inapposite for the additional reason that it does not address the standards applicable to CERCLA "arranger" liability. The central lesson of *Bestfoods*—that to be liable directly under CERCLA, an alleged violator must meet the relevant liability standards based on its own conduct—was the very test applied in this case. The imposition of arranger liability here was entirely proper, particularly in light of GenCorp's own substantial involvement in the disposal of hazardous waste from the TDI Plant.

I. GenCorp Waived Any Argument That Olin's Contribution Claim Did Not Satisfy Section 113(f)(1)'s "During Or Following" Requirement.

GenCorp now maintains that Olin's claim for contribution was not made "during or following" a civil action under CERCLA § 106 or § 107(a), as required by CERCLA § 113(f)(1). GenCorp raised this issue in the district court and identified it as a potential ground for appeal in the court of appeals, but GenCorp then elected not to pursue the issue in its briefing on appeal. GenCorp itself admitted in its petition for rehearing below (Pet. for Reh'g at 14) that it made this deliberate choice. GenCorp thus waived any right it may have had to seek further review on this issue here.

Before electing not to argue any Section 113(f)(1) issue on appeal, GenCorp knew that *Cooper Industries* was before this Court on petition for certiorari and that the Court had invited

the Solicitor General to file a brief expressing the views of the United States. GenCorp also knew that the federal government had filed a brief as amicus curiae before the *en banc* Fifth Circuit, arguing in favor of Cooper Industries' position. Nonetheless, GenCorp freely chose not to appeal the district court's judgment on the ground that the "during or following" requirement in Section 113(f)(1) was not satisfied. GenCorp thus waived any right to raise this issue at a later time in the court of appeals or this Court. *See, e.g., Ramani v. Ashcroft*, 378 F.3d 554, 558 (6th Cir. 2004); *Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 153-54 (6th Cir. 1996).

As this Court admonished in *Ackermann v. United States*, 340 U.S. 193, 198 (1950), "free, calculated, deliberate choices are not to be relieved from." Like the petitioner in that case, GenCorp should not be relieved from the consequences of its knowing and deliberate waiver. By not requesting appellate review of any Section 113(f)(1) issue, GenCorp forfeited any opportunity to obtain review of such an issue here. *Auer v. Robbins*, 519 U.S. 452, 464 (1997) ("Since, however, that argument was inadequately preserved in the prior proceedings, we will not consider it here"); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to consider issue not raised properly in the court of appeals).

II. Olin's Contribution Claim Was Made During Or Following A Civil Action Under CERCLA § 107(a).

GenCorp suggests that this Court should decide whether a UAO issued under Section 106 qualifies as a "civil action" within the meaning of Section 113(f)(1). That issue need not be decided here because Olin's contribution claim would be authorized under Section 113(f)(1) in any event.

Unlike the claimant in *Cooper Industries*, Olin had been sued under Section 107(a) for each site before Olin sought contribution from GenCorp. Olin sought contribution for several Superfund sites, the largest being the Big D landfill in

Ashtabula, Ohio, to which wastes from the TDI Plant were transported for disposal. EPA sued Olin under Section 107(a) for that site in 1991, as explained above The other contaminated sites for which contribution was awarded by the district court are Fields Brook (a waterway that flows past and includes the property on which the TDI Plant was located) and the RES landfill (where TDI Plant wastes were deposited). Both Olin and GenCorp were sued by EPA in 1989 under Section 107(a) for the Fields Brook site. In addition, both Olin and GenCorp were sued under Section 107(a) by the owner of the RES site, and the RES site was not added to Olin's contribution claim in this case until after the RES site owner had named Olin and GenCorp as defendants in that litigation. Thus, Olin's contribution claim was made "during" the EPA Section 107(a) action for Big D, and "following" EPA's Section 107(a) action for Fields Brook and Reserve Environmental's Section 107(a) action for RES.

Moreover, Olin's contribution claim was filed as a counterclaim to GenCorp's original declaratory judgment action against Olin, which asserted that GenCorp was not liable under Section 107 or any other part of CERCLA. Because of the pendency of GenCorp's own complaint against Olin, Olin's counterclaim for contribution was filed during—indeed, in—"a civil action under [Section 107]." *See W. Prop. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004) (holding that Section 107 claims and counterclaims in same action satisfied Section 113(f)(1)'s "during" requirement).[9]

GenCorp contends that the prior Section 107(a) actions against Olin somehow do not count under Section 113(f)(1), because the response costs Olin claimed for Big D and Fields

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[9] The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not provide federal question jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). To establish subject matter jurisdiction for its declaratory judgment action, GenCorp brought the action under CERCLA and specifically requested a declaration of no liability to Olin under Section 107. GenCorp Compl. ¶ 2 & Count II.

Brook were "not subject to" those lawsuits, but were incurred under the UAOs. Pet. 10-11 & n.2. Nothing in the text of Section 113(f)(1) imposes the kind of limitation that GenCorp advocates. As construed in *Cooper Industries*, the statute simply requires that a contribution claim proceed "during or following" a civil action under Section 106 or Section 107(a), and it is undisputed that, with respect to each of the sites at issue, Olin already had been sued under Section 107(a) before it asserted a contribution claim against GenCorp. That is all that Section 113(f)(1) requires. Moreover, GenCorp mischaracterizes the claims made against Olin in the prior Section 107(a) actions. The government did not, as GenCorp contends, seek to recover only oversight costs. Rather, as documented above, Olin was sued to recover all past and future response costs the government had incurred or would incur in the future at each site. Thus, Olin was "subject to" a judgment in those Section 107(a) actions for all of the cleanup costs at each site.

III. Even If The Section 106 Issue Presented By GenCorp Were Important To The Outcome, Review Would Not Be Warranted Because Neither The Court Of Appeals Nor Any Other Federal Appellate Court Has Decided That Issue.

Not surprisingly, given GenCorp's failure to preserve the point, the court of appeals did not decide the Section 106 issue for which GenCorp now seeks review. This Court ordinarily does not decide questions "not pressed or passed upon below;" the Court will grant review of such a question "only in exceptional cases." *Duignan v. United States*, 274 U.S. 195, 200 (1927). This is not an "exceptional case." Not only has the court below not decided GenCorp's Section 106 issue, but *no* court of appeals has yet ruled on this question. This alone constitutes sufficient reason to deny review. *McCray v. New York*, 461 U.S. 961, 962 (1983) (denying certiorari where "further consideration . . . of the problem by

other courts will enable us to deal with the issue more wisely at a later date" and where "presently no conflict [exists] within the federal system"); *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1976) (endorsing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").[10] Nor can GenCorp claim any prejudice, especially after abandoning the very issue for which it now seeks review. The judgment, after all, merely requires GenCorp to pay its fair share of the cleanup costs associated with the TDI Plant that GenCorp jointly operated with Olin. That is not an outcome that suggests a need for further consideration.

GenCorp argues, however, that granting certiorari would be appropriate here because this Court often considers issues that it has specifically reserved in earlier decisions. Pet. 9. GenCorp relies on three cases, each readily distinguishable.[11] In those cases, unlike this one, the issue for which certiorari was granted had been decided in the judgment under review. None of those cases stands for the proposition that review should be granted to decide an issue the Court reserved previously where, as here, the court of appeals did not address that issue because the petitioner chose not to include it among the grounds for appeal.

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[10] GenCorp (Pet. 13) cites one district court decision, *Pharmacia Corp. v. Clayton Chem. Acquis. LLC*, No. 02-CV-0428, 2005 WL 615755 (S.D. Ill. Mar. 8, 2005), that has addressed the Section 106 issue after *Cooper Industries*, and we have found another such case. *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955 (W.D. Mo. June 27, 2005). Neither involved a situation where, as here, the contribution claimant had been sued under Section 107(a) before pursuing its contribution claim. Both district courts regarded this fact as significant.

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379-80 & n.6 (1983); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 402 (1981); and *Warden, Lewisburg Penitentiary v.* Marrero, 417 U.S. 653, 656 (1974).

IV. Contrary To GenCorp's Contention, A UAO Issued Under Section 106 Qualifies As A "Civil Action" Under Section 106 For Purposes Of CERCLA's Contribution Provision.

The term "civil action" is not defined in CERCLA, and it is not a term of art with a precise, technical meaning. Congress easily could have excluded UAOs explicitly from the first sentence of Section 113(f)(1), but it did not do so. Although "civil action" might be read to refer solely to prior litigation—to the exclusion of any other formal administrative proceeding—that approach does not comport with the text, purpose, or structure of CERCLA. The panel majority in *Aviall I* correctly observed that Section 106 specifically contemplates a variety of legal proceedings—administrative as well as judicial—all civil in nature, leading that court to conclude in dictum that UAOs come within the meaning of "civil action" under Section 113(f)(1). *Aviall I*, 263 F.3d at 140 n.5, 145.

In Section 113(f)(1), Congress clearly meant to provide a contribution remedy so that PRPs legally compelled to pay for environmental cleanups would have a clear statutory right to recover a portion of the cost from other PRPs. UAOs provide such compulsion in several ways. A PRP cleaning up a site under a UAO, for example, has no right to challenge the agency's remedy until the work is completed, and even then any such challenge is subject to an "arbitrary and capricious" standard of review. 42 U.S.C. § 9606(b)(2)(D); *Dico, Inc. v. Diamond*, 35 F.3d 348, 351 (8th Cir. 1994). In addition, the penalty for refusing to comply is $25,000 per day under Section 106(b)(1), 42 U.S.C. § 9606(b)(1), as well as treble damages under Section 107(c)(3), 42 U.S.C. § 9607(c)(3), if the government performs the cleanup.

GenCorp's restrictive interpretation of Section 113(f)(1)—excluding UAOs from the term "civil action"—would lead to an incongruous result. It would *discourage* compliance with UAOs by precluding contribution where, after being found

liable by EPA and ordered administratively to clean up a hazardous waste site, a PRP did so without first making the agency sue for injunctive relief, sanctions, or cost recovery. That hardly can be what Congress had in mind, and GenCorp has offered no explanation for why Congress would have devised a scheme that produces such an anomalous result.

Against this backdrop, construing the term "civil action" to include UAOs is not only reasonable, but also is far more consistent with the overall statutory structure than the "litigation only" interpretation GenCorp advances. Nothing in CERCLA suggests that a PRP that has complied with a UAO is somehow less worthy of obtaining contribution than a PRP that refuses to comply and must be sued by the government. Because the term "civil action" is ambiguous, has more than one possible meaning, and, under GenCorp's interpretation, would have highly undesirable consequences for agency cleanup orders, a reading that includes UAOs would keep faith not only with the statutory text but also with CERCLA's role as "remedial legislation . . . [that] should be construed liberally to carry out its purposes." *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996).

V. Even If Olin Could Not Proceed Under Section 113(f)(1), It Could And Did Seek The Same Recovery Against GenCorp Under Section 107(a), And That Is A Further Reason For Leaving The Judgment Undisturbed.

Even if this Court were to disregard the prior Section 107 actions against Olin and conclude that UAOs are not civil actions for purposes of contribution under Section 113(f)(1), there would be no reason to disturb the judgment here. GenCorp totally ignores the implied right of contribution under Section 107(a) recognized in *Key Tronic*, and mistakenly assumes that contribution under Section 113(f)(1) is limited to sums that have been reduced to judgment in a prior Section 106 or Section 107(a) action. Pet. 10.

In *Key Tronic*, the Court unanimously agreed that Section 107(a) "unquestionably provides a cause of action for PRPs to seek recovery of cleanup costs." 511 U.S. at 818.[12] The majority stated that such a right of contribution is implied, while the dissenting Justices concluded that such a right is expressly provided by Section 107(a). *Id.* at 818, 822. There is no indication from this Court's construction of these provisions that the relief available to Olin under Section 107(a) would be any different from that available under Section 113(f)(1). Nor is it likely that Congress would have chosen to leave Olin or other PRPs performing cleanups pursuant to UAOs with no avenue to recover from other PRPs, unless they first forced EPA to take them to court for an injunction compelling compliance. Such a scheme would make no sense. Because Olin is entitled to recover from GenCorp under Section 107(a) if not under Section 113(f)(1), review in this Court of the Section 106 issue now presented by GenCorp is not warranted.

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[12] Although the dissent in *Cooper Industries* urged the Court to decide whether Aviall could recover its costs under Section 107, 125 S. Ct. at 588, the Court declined to do so and left that question for the lower courts on remand. *Id.* at 586. Following that ruling, a number of district courts have allowed PRPs to recover under Section 107(a) where a right of action under Section 113(f)(1) was unavailable. *E.g.*, *Vine St. LLC v. Keeling*, 362 F. Supp. 2d 754, 764 (E.D. Tex. 2005); *Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913, 918 (N.D. Ill. 2005); *Adobe Lumber, Inc. v. Taecker*, Civ. No. S02-186, 2005 WL 1367065, at *1 (E.D. Cal. May 24, 2005); *Kotrous v. Goss-Jewett Co.*, Civ. No. S02-1520, 2005 WL 1417152, at *4 (E.D. Cal. June 16, 2005); *Viacom, Inc. v. United States*, No. 05-0468, 2005 WL 1902849, at *6 (D.D.C. July 19, 2005); *Ferguson v. Arcata Redwood Co.*, No. C03-05632, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005).

VI. GenCorp's Proposed Alternative Procedure—Granting Review, Vacating The Judgment, And Remanding For Reconsideration In Light Of *Cooper Industries*—Is Not Appropriate In The Circumstances Of This Case.

GenCorp's petition did not reach the Court during the pendency of *Cooper Industries* and was not held in abeyance awaiting the outcome of that case. Not only did GenCorp waive any issue about the propriety of Olin's contribution claim under Section 113(f)(1), but the judgment below does not even arguably conflict with *Cooper Industries*, given that Olin already had been sued under Section 107(a) before Olin claimed contribution from GenCorp. Rather than seek remand in light of *Cooper Industries* to address some purported inconsistency, a justification GenCorp does not advance, GenCorp instead seeks to have the judgment remanded for consideration of an entirely different question expressly left open in *Cooper Industries*. This is not the purpose of this Court's "GVR" procedure, however, and applying that procedure in this situation would undermine the criteria laid down by the Court for GVR orders.

The GVR procedure serves the interests of justice by conserving this Court's resources where multiple cases raise essentially the same issue. It enables this Court to consider several lower court decisions before it decides the merits of an issue, and it reduces the potential for unequal treatment that might arise where the particular issue selected for review comes from a case other than the petitioner's. It also permits this Court to flag for the lower courts on remand some arguments that may not have been considered fully before. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Extending the GVR procedure to raise a new issue not decided by this Court, as GenCorp now urges, would promote none of these interests. As demonstrated above, this case does not turn on the question decided in *Cooper Industries* or on the question reserved in that case.

This is not a case in which an accident of timing would deprive a litigant of the benefit of a new rule of law decided after it had pressed for such a rule and lost. GenCorp nevertheless maintains that GVR is appropriate because *Cooper Industries* is an "intervening development," one the courts below had no "opportunity to consider" and which "should have [an] outcome-determinative effect" on this case. Pet. 12. To the contrary, the judgment is in harmony with the holding in *Cooper Industries*; GenCorp has only itself to blame for failing to present any issue under Section 113(f)(1) in its opening brief or reply brief in the court of appeals; and GenCorp in fact did inform the court of appeals of the *Cooper Industries* decision, both in a motion to vacate the judgment and in a reply memorandum in support of GenCorp's rehearing petition.

Under these circumstances, there is no basis for invoking the GVR procedure. The record does not "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" on remand. *Lawrence*, 516 U.S. at 167. Moreover, the equities overwhelmingly favor Olin. *See id.* at 167-68 ("Whether a GVR order is ultimately appropriate depends further on the equities of the case[.]"). GenCorp pursued a "manipulative litigation strategy," *id.* at 168, by abandoning the issue of Section 113(f)(1) eligibility initially, and then abruptly reversing course in hopes of profiting from *Cooper Industries* after that case was decided. More fundamentally, both lower courts correctly concluded that GenCorp bears a significant share of responsibility for the cost of environmental remediation necessitated by waste disposal practices employed at the TDI Plant, which GenCorp jointly operated with Olin. *Cooper Industries* provides no basis for revisiting that result.

VII. GenCorp's Fact-Intensive Claim That It Did Not "Own Or Possess" The Hazardous Waste Generated By The TDI Plant Was Not Presented To The District Court, Was Correctly Rejected By The Court Of Appeals, And Does Not Warrant Further Review.

GenCorp claims that a prerequisite for arranger liability—that the hazardous substances in question be "owned or possessed" by the defendant—was not satisfied in this case because GenCorp did not own the TDI wastes sent to Big D. Pet. 14. The court of appeals considered this argument despite GenCorp's failure to raise it in the district court, Pet. App. 24a, and found that the statutory requirement was satisfied by the extensive control GenCorp exercised over the disposal of hazardous wastes from the TDI Plant. *Id.* at 24a-28a. GenCorp does not dispute the control it exercised; rather, in reliance on *Dole Food*, GenCorp maintains that control is irrelevant to arranger liability under CERCLA. The court of appeals properly rejected this argument, and its decision to apply the ordinary meaning of "own" and "possess" does not warrant further review.

As a matter of statutory construction, the terms "own" and "possess"—which are not defined under CERCLA—should be given their ordinary and established meanings, as the court of appeals recognized. Pet. App. 25a-26a. Webster defines "*possess*" as "to take into one's possession . . . gain control of" and "*possession*" as "the act or condition of having in or taking into one's control or holding at one's disposal." WEBSTER'S THIRD NEW INT'L DICTIONARY at 1770 (1966). Moreover, because "[t]he law, in general, recognizes two kinds of possession: actual possession and constructive possession," BLACK'S LAW DICTIONARY at 1047 (5th ed. 1979), numerous courts have found liability based on constructive ownership or possession for matters both criminal and civil, as the court of appeals noted. Pet. App. 25a-26a. There is no indication that Congress used "own" or "possess" in

CERCLA in some different or narrower sense, and GenCorp has identified no such evidence. The element of "control" is thus inherent in CERCLA's "own or possess" requirement, and the court of appeals rightly concluded that "constructive ownership or possession" suffices for arranger liability. Pet. App. 26a-27a. These conclusions are completely in line with the decisions of other courts of appeals.[13]

The facts found by the district court—and not challenged by GenCorp on appeal—establish that GenCorp's control over the disposal of TDI Plant wastes amounts, at the very least, to constructive ownership and possession of hazardous substances. As demonstrated above, GenCorp approved, funded, and paid for waste disposal arrangements; had responsibility for daily TDI Plant operations, including waste removal; funded efforts to reduce the amount of TDI waste; demanded changes in waste disposal practices at Big D; signed transport documents; and negotiated service orders with waste haulers. Furthermore, given that GenCorp workers collected and drummed wastes at the TDI Plant and loaded the drums onto trucks for transport to Big D, GenCorp personnel were the last to have *actual* possession at the TDI Plant as the hazardous wastes were being hauled off to Big D for disposal. There can be no question that the "owned or possessed" requirement was satisfied here.

GenCorp contends, however, that *Dole Food* precludes consideration of GenCorp's control over waste disposal

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[13] *See, e.g. Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 25 (1st Cir. 2004) (where "broker arranges for the disposal of hazardous waste and it does so by exercising control over the waste, such control can amount to constructive possession of the waste."); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (finding plant manager liable as arranger when he exercised actual control over the plant's hazardous substances); *United States v. Shell Oil Co.*, 294 F.3d 1045, 1057-58 (9th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (declining to impose arranger liability where United States neither exercised actual control over hazardous waste disposal nor had any duty to exercise control).

practices in connection with determining CERCLA arranger liability. *Dole Food* has nothing to do with arranger liability, however, and GenCorp's reliance on that case is misplaced. The Court there construed the phrase "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state" in the definition of an "instrumentality" of a foreign state under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1603(b)(2). The question was whether, under that statute, a foreign state had to own a majority of the shares of an indirect, second-tier subsidiary for the subsidiary to be deemed an instrumentality of the state, or whether ownership of a majority of the shares of the subsidiary's corporate parent would suffice. The Court determined that "owned" within the meaning of the FSIA requires actual shareholding and cannot be based solely on corporate "control" through a parent company.

This ruling has nothing to do with the proper application of arranger liability under CERCLA. "Possession" was never addressed in *Dole Food* because that term does not appear in the FSIA definition involved in that case. Yet, possession alone suffices for CERCLA arranger liability because (1) ownership is not necessary where the statute expressly covers hazardous substances that are either "owned *or* possessed" by a PRP; and (2) control is, by definition, a component of the meaning of "possessed," as explained above. There is no reason to conclude that the *Dole Food* analysis under the FSIA should govern the interpretation of "owned or possessed" under CERCLA when the language and purposes of the two statutes are entirely different. *See Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978) (concluding that reliance on another statute to construe the one in question "sheds no light on congressional intent" due to "significant differences," where the statute in question provided for "legal or equitable relief," but the other "did not authorize 'legal' relief").

VIII. GenCorp's Reliance On *Bestfoods* Is Misplaced Because *Bestfoods* Did Not Consider CERCLA "Arranger" Liability And, In Any Event, The Court Of Appeals Properly Applied The Teaching Of *Bestfoods*.

GenCorp's contention that the judgment below threatens to usher in some kind of mass "end run" around the liability limits of *Bestfoods* cannot withstand scrutiny. GenCorp misunderstands *Bestfoods* and reads into that decision standards for arranger liability that the Court neither considered nor addressed. The court of appeals properly identified and applied the "central lessons" of *Bestfoods* when it rejected GenCorp's argument on this point. Pet. App. 23a-24a. The court's analysis is amply supported, both factually and legally. Further review is not justified.

Bestfoods concerns CERCLA § 107(a)(*2*)-"operator" liability and does not purport to establish any standards whatever for liability as an "arranger" under Section 107(a)(*3*). The question in *Bestfoods* was whether a corporate parent could be directly liable in its own right as a CERCLA "operator" of a subsidiary's facility, where the showing necessary to pierce the subsidiary's corporate veil could not be made. *Id.* at 63-64 & n.9. The Court concluded that direct CERCLA liability could be imposed for the parent company's own actions in operating a subsidiary's facility, *id.* at 55, provided that the corporate parent itself "manage[s], direct[s], or conduct[s] operations specifically related to pollution" at the facility. *Id.* at 66.

No liability was imposed on GenCorp in this case for pollution at a subsidiary's facility, and GenCorp's appeal did not challenge its liability as an "operator" of the TDI Plant for contamination of the plant site and Fields Brook. *Bestfoods* is therefore not directly on point. GenCorp nonetheless insists that the arranger liability judgment "nullifies" the limits on liability imposed under *Bestfoods*, arguing that (1) the analy-

sis for arranger liability "is analogous to" that for operator liability, and (2) the judgment holds GenCorp liable as an arranger because of a "generalized intent to purchase a product from a supplier," not because of any "actual involvement in arranging for disposal of waste." Pet. 16. Neither argument has merit.

GenCorp's assertion that the standards governing arranger and operator liability are "analogous" is neither explained nor supported by authority. Moreover, it is not correct. For arranger liability, it is not necessary to show that a PRP managed, directed, or controlled operations at a facility where hazardous substances are released, which is the relevant inquiry for operator liability under *Bestfoods*. Rather, as the court of appeals explained, arranger liability requires that the PRP "have some intent to make preparations for the disposal of hazardous waste," an "inquiry [that is] highly fact-driven" because proof of such an intention "may be inferred from the totality of the circumstances." Pet. App. 21a (citations and internal quotation marks omitted). The record is replete with evidence that GenCorp had the requisite intent, including GenCorp's 1962 Agreement with Olin, its approval of TDI Plant designs, specifications, and waste disposal practices, its decisions concerning waste disposal as Olin's equal partner on the TDI Committee, and its funding of waste disposal operations and projects to reduce waste volumes.[14]

GenCorp's second contention is a gross mischaracterization. As demonstrated above, GenCorp's arranger liability was based on an extensive record of GenCorp's actual conduct, over many years, in implementing its business relation-

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[14] If "active involvement" in waste disposal is required, as GenCorp contends, there are ample grounds to find arranger liability under that standard here as well, given that GenCorp employees were responsible for waste removal at the TDI Plant, collected and drummed TDI Plant wastes, loaded the drums onto trucks bound for Big D, and inspected Big D and demanded corrective measures.

ship with Olin. It was not premised on GenCorp's self-serving—and totally misleading—assertion that it was a customer who merely intended to purchase products from a supplier. GenCorp was anything but a mere customer, as the court of appeals recognized in its answer to this argument (Pet. App. 28a):

> [O]ur decision does not mean that mere customers of waste-generating manufacturers or processors will face 'arranger' liability under CERCLA—unless, that is, they exercise control over the hazardous waste and its disposal as GenCorp did in implementing this unique business relationship.

GenCorp's argument that "virtually every customer" must now be concerned about "fac[ing] liability for cleanup costs the supplier later incurs" (Pet. 17) distorts the record and the court of appeals' holding.

The fact that GenCorp did not hire the waste hauler that transported TDI wastes to Big D is beside the point. GenCorp's argument applies an overly restrictive meaning to the phrase "arranged for disposal . . . or arranged with a transporter for transport for disposal" under CERCLA § 107(a)(3). As the court of appeals correctly concluded, GenCorp's disavowal of responsibility for hiring the waste hauler, given the record of GenCorp's extensive involvement in the disposal of waste from the TDI Plant, does not insulate it from arranger liability. Pet. App. 24a. Nothing in *Bestfoods* conflicts with this conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-11

Supreme Court, U.S.
FILED
SEP 15 2005
OFFICE OF THE CLERK

In the Supreme Court of the United States

GENCORP INC.,

Petitioner,

v.

OLIN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

Whether a unilateral administrative order ("UAO") is a "civil action" that triggers a right of contribution under 42 U.S.C. § 9613(f)(1) is a question with nationwide implications. The Environmental Protection Agency ("EPA") has issued nearly 1,000 UAOs under section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") that are still pending throughout the country. The EPA continues to issue new UAOs at a rate of about forty per year. The pending UAOs affect forty-seven states and involve billions of dollars in environmental cleanup expenses. (*See* Pet. 3.)

Parties subject to the UAOs may, like Olin, incur millions of dollars of cleanup expenses without a judicial proceeding enforcing the UAO, thus raising precisely the question noted and reserved by this Court in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577, 584 n.5 (2004): namely, whether a party like Olin has a contribution action under section 113(f)(1) of CERCLA for recovery of costs incurred under a UAO. This case presents the question squarely. By answering it, this Court can bring certainty to a key aspect of CERCLA enforcement that involves billions of dollars of cleanup costs throughout the nation.

Respondent Olin does not dispute the national importance of this question. Nor does Olin contest that this Court's decision in *Cooper Industries* changed the established law and practice of CERCLA contribution. It is also undisputed that the court of appeals never considered the application of *Cooper Industries* to this action, even though it is well-established that courts must apply the law as it exists while a dispute is pending regardless of whether the party benefiting from the change of the law anticipated it in its prior briefing. Nor, as Olin acknowledges, has any other court of appeals given substantive guidance in light of *Cooper Industries* to the

nearly one thousand parties subject to UAOs on the critical issue of whether a section 113(f)(1) contribution claim exists for recovery of costs incurred under the UAOs. Finally, resolving the question in this case will ensure that a single, post-*Cooper Industries* rule of decision applies uniformly to not only the future costs Olin still seeks to recover on remand, but also to the past costs that are the subject of this appeal. Accordingly, this Court should issue a writ of certiorari or, alternatively, issue a GVR order requiring the court of appeals to address the issue on the merits.

ARGUMENT

I. Whether Olin May Recover in a CERCLA Contribution Action the Costs it Incurred Under a UAO is a Question Properly Before the Court in Light of This Court's New Decision in *Cooper Industries*.

Olin does not contest that the *Cooper Industries* decision was an intervening change in the law of CERCLA contribution, as the Second Circuit recently affirmed. *See Consol. Edison Co. of NY v. UGI Utils., Inc.*, No. 04-2409-CV, --- F.3d ---, 2005 WL 2173585, at *8 n.12 (2d Cir. Sep. 9, 2005). Indeed, before this Court's decision, the only court of appeals decision in the country to reach the same result as this Court (on a divided vote) was ultimately vacated *en banc*. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 278 F.3d 416 (5th Cir. 2001) *vacated by* 312 F.3d 677 (2002) (*en banc*). In the trial court, Olin argued that every other court in the country to address the issue before *Cooper Industries*, including the Sixth Circuit in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 351-52 (6th Cir. 1998), had reached the same result as the en banc Fifth Circuit—precisely the opposite result ultimately reached by this Court. (Olin's Mem. in Opp. to GenCorp's Mot. for Recons. of the Court's May 9, 2002 Mem. Op. in Light of *Aviall*, Nov. 7, 2002, 6-14.)

GenCorp could not waive an argument that arises from a change in the law that occurred while this case was on appeal. The rule that a federal appellate court must "apply the law in effect at the time it renders its decision" dates back to the venerable *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801). *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). This reasoning applies to judicial as well as statutory changes in the law. *E.g.*, *Thorpe v. Hous. Auth. of the City of Durham*, 393 U.S. 268, 282 (1969); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 349-50 (1941). Consequently, when an intervening decision of this Court modifies an applicable legal rule, federal appellate courts consider it even if the party seeking to raise the issue did not do so in its initial briefing. *Cf. United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (plurality opinion) ("the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground"); *United States v. Pruitt*, 156 F.3d 638, 643 n.1 (6th Cir. 1998) (agreeing to address issue that appellant failed to raise either in the trial court or in appellate briefing, based on the interest of justice); *Brown v. M&M/Mars*, 883 F.2d 505, 512-13 (7th Cir. 1989).

The Supreme Court's decision in *Cooper Industries* is an intervening change in law with dispositive implications for Olin's claims. Olin's claim that GenCorp waived the issue by failing to anticipate that this Court would grant certiorari in *Cooper Industries* and reach a result contrary to established precedent in the lower courts is not only contrary to common sense but also unsupported by any authority. Indeed, none of the cases cited by Olin even address an intervening change in the law. *See Ramani v. Ashcroft*, 378 F.3d 554, 558 (6th Cir. 2004) (waiver based on failure to raise an issue below, no intervening change in law); *Bickel v. Korean Air Lines Co.*,

96 F.3d 151, 153-54 (6th Cir. 1996) (noting that an intervening Supreme Court decision "neither added to, nor made a change in, the law" at issue). Accordingly, the Court should grant a writ of certiorari or, alternatively, issue a GVR order sending the case back for the court of appeals to address the issue substantively. *See Paulussen v. Herion*, 475 U.S. 557, 559 (1986) (vacating decision and remanding for consideration of "intervening change in state law") (per curiam); *Doe v. Delaware*, 450 U.S. 382, 389-90 (1981) (the Court's "uniform practice" is to vacate and remand upon a supervening change in the law) (per curiam); *Addison-Taylor v. United States*, 73 Fed. Appx. 418, 420 (Fed. Cir. 2003) (vacating judgment in light of change in the law).

The court of appeals did not address the effect of *Cooper Industries* in this case, even though GenCorp raised the decision with the court of appeals as soon as this Court issued it. Olin's suggestion that GVR is inappropriate because "there is no reason to believe that the court of appeals would act differently now" (Br. in Opp. 14), mistakenly assumes the court of appeals has already issued a substantive ruling on the issue. It did not. In the order denying GenCorp's petition for rehearing, the court of appeals stated only "that the issues raised in the petition were fully considered upon the original submission and decision of the case." (App. 2a.) Because the issues originally briefed and argued did not include—and could not have included—this Court's subsequent reasoning in *Cooper Industries*, the court of appeals plainly has not yet addressed this question on the merits.[1]

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[1] GenCorp also raised the effect of *Cooper Industries* on this case in a motion to vacate filed after the decision was entered in the court of appeals. (Mot. to Vacate and Remand in Light of the S. Ct.'s Decision in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, Jan. 7, 2005.) The court of

This case also illustrates the practical reason underlying the general rule that an intervening change in the law is not subject to waiver. Any other rule would risk artificially dividing an ongoing case and requiring one set of rules for one portion of the case, and an inconsistent set of rules for the other part of the case. Here, for example, the court of appeals ordered a remand to the district court for further consideration of Olin's claim for future costs. (App. 32a.) Olin's right, if any, to recover these future costs will indisputably be subject to the post-*Cooper Industries* rules of CERCLA contribution. But unless this Court intervenes on certiorari or requires the court of appeals to address the issue under a GVR order, the trial court might conclude (and Olin will certainly argue) that Olin's recovery of past costs is subject to the different set of pre-*Cooper Industries* contribution rules. The well-established rule refusing to recognize a waiver argument in the context of a change of law prevents such an incongruous result.

II. Section 113(f)(1) Creates a Right of Contribution Only for Costs Incurred as a Result of a Prior Civil Action Under Section 106 or Section 107, and Not for Recovery of Costs Incurred Under a UAO.

Olin cannot avoid the effect of *Cooper Industries* by relying upon an action in which the federal government recovered modest administrative oversight costs for the cleanup Olin performed under the UAO. Section 113(f)(1) of CERCLA states that "[a]ny person may seek contribution from any person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 or section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). Contribution, by its nature, requires a

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appeals denied the motion without analysis and without any indication of its view on the merits of this issue. (Order, Jan. 21, 2005.)

pre-existing liability or obligation. *See Centerior*, 153 F.3d at 350-52. Under section 113(f)(1), that liability or obligation must have been determined by a "prior civil action." In this case, there is no civil action that ever established Olin's liability for the costs it incurred under the UAO before Olin sued to recover those costs from GenCorp.[2]

Olin's suggestion that section 113(f)(1) does not require any relationship between the prior civil action and the liability for which a party seeks contribution is not consistent with the statute. By using the legal term "contribution," Congress is presumed to have intended that the term be given its established legal meaning. *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000). Contribution is the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear." *Centerior*, 153 F.3d at 350 (quoting *Blacks Law Dictionary* 328 (6th ed. 1990)). It applies "when two or more persons become liable in tort to the same person for the same harm . . . ." *Id.* (quoting Restatement (Second) of Torts § 886A). Section 113(f)(1)'s requirement of a prior civil action shows the liability for which Congress intended to provide contribution. Olin's suggestion that it is entitled to contribution for costs that were not incurred because of a prior civil action, but simply under a UAO, is plainly inconsistent with the requirements of section 113(f)(1). Under this Court's reasoning in *Cooper Industries*, Olin may

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[2] Olin emphasizes the section 107 action by which the EPA recovered its administrative oversight costs, but fails to mention that those oversight costs totaled only $1,542,541 of the more than $60 million for which Olin seeks recovery in this action.

not recover in a CERCLA contribution action for the costs it incurred in response to the UAO.[3]

III. This Court Should Resolve the Question It Reserved in *Cooper Industries* Because the Facts of This Case Squarely Present It, and Because Both the Government and Private Parties Throughout the Nation Need This Court's Guidance in Spending Potentially Billions of Dollars in Cleanup Expenses.

This case squarely presents the issue reserved in *Cooper Industries* of whether a section 106 UAO is a civil action that triggers contribution rights under CERCLA. Olin does not contest that the issue has national importance. Nor does Olin disagree that early resolution of the issue will provide needed guidance to lower courts, the government and the private parties subject to the nearly 1,000 UAOs pending throughout the country. Indeed, the issue of whether a UAO is a civil action will affect parties throughout the United States who have incurred and continue to incur environmental cleanup costs totaling billions of dollars. As Olin notes, the issue has already arisen twice in litigation that was pending prior to this Court's decision in *Cooper Industries*. (Br. in Opp. 19 n.10.)

Olin's argument that a UAO should qualify as a "civil action" is contrary to the views expressed to this Court by the United States in *Cooper Industries*. (Br. of the United States as *Amicus Curiae* Supporting Pet'r, 22 n.11.) It has also been rejected by the only courts that have addressed the issue in light of *Cooper Industries*. *Blue Tee Corp. v. ASARCO, Inc.*,

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[3] Olin's reference to GenCorp's declaratory judgment action seeking a declaration of non-liability under CERCLA does not improve Olin's position. GenCorp's claim made no effort to recover costs or other damages of any kind under CERCLA. It was simply an action for declaratory relief under the Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202.

No. 03-5011-CV-SW-F-JG, 2005 WL 1532955 (W.D. Mo. June 27, 2005); *Pharmacia Corp. v. Clayton Chem. Acquis. LLC*, No. 02-CV-0428, 2005 WL 615755 (S.D. Ill. Mar. 8, 2005). Nevertheless, the issue remains open and subject to debate in the literature. *E.g.*, Richard J. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 Tul. Envtl. L.J. 323, 333 (2005). The question cries out for prompt and authoritative resolution. Olin's recognition of the absence of guidance from the courts of appeal, (Br. in Opp. 18.), actually underscores the need for this Court to act in this case, either by settling the question itself on certiorari, or at least by entering a GVR requiring the court of appeals to address the merits of the question.[4]

IV. Even Apart From *Cooper Industries*, This Court Should Grant Certiorari to Preclude Application of a New and Expansive Theory of CERCLA Liability Against Customers of Hazardous Waste Generators.

This Court should also grant certiorari, as it did in *United States v. Bestfoods*, 524 U.S. 51 (1998), to prevent a dramatic expansion of potential liability under CERCLA. The result in

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[4] Olin's claim that the exercise would be meaningless because a direct cost recovery claim under section 107 will lead to the same result even in the absence of a contribution claim is erroneous. As a potentially responsible party, Olin has no right to assert a direct cost recovery action under section 107. This was the holding of the Sixth Circuit in *Centerior*, and of every other Circuit to address the issue before this Court's ruling in *Cooper Industries*. *Cooper Indus.*, 125 S. Ct. at 585; *Centerior*, 153 F.3d at 349, 356 (collecting cases). *But cf. Consol. Edison Co. of NY v. UGI Utils., Inc.*, No. 04-2409-CV, — F.3d —, 2005 WL 2173585 (2d Cir. Sep. 9, 2005). Moreover, any potential Olin claim under section 107 is barred, in any event, because the trial court here applied *Centerior* to dismiss it, (Mem. & Order, dated Feb. 23, 1999, at 2), and Olin did not appeal the dismissal.

this case, when contrasted with the result in *Bestfoods*, is incongruous. The decision below subjects a large customer of a polluting company to a higher risk of CERCLA liability than the parent corporation of the very same polluting company, even though the parent company has actual and complete control over the polluting company, and the customer has, at most, some economic leverage. The result below also creates the potential for an end run on this Court's unanimous decision in *Bestfoods* that a parent corporation cannot be liable as an operator under section 107(a)(2) of CERCLA for pollution caused by its subsidiary based simply on its ownership and control of the subsidiary. If the result in this case stands, *Bestfoods* will wither into irrelevance because even though the parent corporation enjoys protection from liability for its subsidiary's pollution as an operator under section 107(a)(2) of CERCLA, it will still be liable for the subsidiary's polluting acts as an arranger under section 107(a)(3) based on precisely the same factors this Court found insufficient to impose liability in *Bestfoods*. This Court can prevent that result by granting certiorari to enforce the statutory requirements that a party "own or possess" the hazardous substances disposed of—a finding the trial court did not make in this case—and that a party actually arrange for the disposal of the hazardous substances, and not simply have a close relationship with, or even a measure of control over, the actual arranger.

The courts' decisions below expand CERCLA liability to customers by imposing arranger liability on GenCorp even though GenCorp did not make the actual arrangements for disposing of the hazardous waste and even though GenCorp did not own or possess the hazardous substances. Olin—not GenCorp—was the only party that owned and possessed the hazardous waste disposed of at Big D, and Olin—not GenCorp—made the actual arrangements for disposal. Olin

owned and operated the TDI plant. (App. 42a.) Olin produced the TDI using Olin's proprietary process. (App. 35a, 46a.) Olin owned the TDI and the TDI waste produced by the plant. (*See id.*) Olin profited from the sale of the TDI. (App. 44a-45a.) Olin hired the waste hauler to transport its TDI waste and dump it at Big D. (App. 8a.) In short, Olin's plant, using Olin's process, created TDI and TDI waste, and Olin arranged for its disposal at Big D.

These factual conclusions, which are undisturbed on appeal, demonstrate that it was Olin—not GenCorp—that actually "owned or possessed" the wastes at issue, and that it was Olin—not GenCorp—that actually "arranged for disposal" of the material at Big D. Indeed, it is undisputed that the actual contract for disposal was on an Olin purchase order. (App. 8a.) The decisions below soften the statutory barriers to liability in precisely the same way that this Court attempted to prevent in *Bestfoods*. The decision below demonstrates that this Court needs, once again, to enforce the plain language of CERCLA to prevent creation of yet another expansive, policy-oriented theory of environmental liability.

CONCLUSION

This case squarely presents the question this Court reserved in *Cooper Industries* of whether a section 106 UAO is "civil action" that triggers a right to contribution under section 113(f)(1) of CERCLA. Because this and the other issues presented in GenCorp's petition are of national importance, involving nearly 1,000 UAOs and billions of dollars in cleanup expenses, this Court should grant a writ of certiorari or, in the alternative, issue a GVR order and send the case back to the court of appeals for consideration of the effect of this Court's decision in *Cooper Industries* on Olin's right, if any, to CERCLA contribution for costs incurred under a UAO.

September 15, 2005

Respectfully submitted,

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